PRINCIPLES

OF THE

LAW OF REAL PROPERTY,

INTENDED AS

A FIRST BOOK

FOR

THE USE OF STUDENTS IN CONVEYANCING.

BY THE LATE

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The Nineteenth Edition.

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PREFACE

TO THE NINETEENTH EDITION.

In this edition the alterations made in the law since the publication of the last edition have been incorporated in the text. These are principally those made by the Land Transfer Act, 1897, and the Land Charges Act, 1900. Part of the chapter on Free Tenure (pp. 40—45) has been re-written in the light furnished by Professor Maitland's "Domesday Book and Beyond." It has, of course, been necessary to refer to the change made by the first part of the Land Transfer Act, 1897, which introduced the devolution of real estate to executors or administrators, in several parts of the book, and to notice (pp. 57, 108, 131, 187, 220, 277, 282, 311n., 344, 358, 478) some of the many questions which are raised by the wording of that exceedingly ill-drafted measure. The provisions, relating to compulsory registration, of the second part of this Act have also been mentioned in the body of the text where necessary. The rest of the second part of the Act has been stated in a separate chapter (Part VII.) added at the end of the book, the writer thinking that a student should acquaint himself with the general principles of the

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land laws before studying the special system which is at present compulsory only in the county of London. The statement and discussion of the changes introduced by the Land Transfer Act, 1897, have occupied so much space that the writer has been obliged to omit three of the late author's Appendices. This he has done with great regret, as, although they were not meant for, or usually noticed by students who merely took up the law of Real Property for the purpose of passing an examination, they were read by men who were preparing themselves for actual practice in this branch of the law; and to these they afforded admirable models of legal argument. The points argued in the Appendices omitted were, however, all subsequently decided in accordance with the views which the late author expressed. The writer has been decided in retaining the Appendices printed in this edition by the fact that, not long ago, he was asked to advise on the question discussed in Appendix C, when he found that this appendix is the principal, if not the only exposition of the reasons for holding that a husband shall have curtesy of the lands to which his wife became entitled by descent.

There have been added in this edition to the chapter on the Form of a Conveyance (Part VI.) a precedent of a mortgage and a precedent partly in outline of a settlement of land. The writer thinks that it cannot but quicken a student's understanding of these transactions to have before him forms of the deeds by which they are actually carried out.

The concluding remarks (pp. 651—657) on the present state of the law of Real Property are new.

The index to this edition has been prepared by Mr. J. F. Iselin, of the Inner Temple, who is also responsible for the correction of the press.

7, Stone Buildings, Lincoln's Inn,
12th March, 1901.

PREFACE

TO THE SEVENTEENTH EDITION.

The present work is put forward as the seventeenth edition of the late Mr. Joshua Williams's "Principles of the Law of Real Property"; but it is right to explain that it is to a large extent a new book. Since the late author's death in 1881 (*a*), three editions of the book have been prepared by the present editor: and in these the original text was, as far as possible, retained. It was felt, however, that the symmetry of the original work was impaired by the additions and alterations rendered necessary not only by the great changes in law and practice worked by the Conveyancing and Settled Land Acts, but also by the progress of historical learning. In preparing the edition now submitted to the profession the editor has ventured to work with a free hand, and to remodel the book after a design of his own. The subject is therefore presented under an arrangement different from that previously employed, and a very considerable proportion of the text is new. At the same time the scheme now adopted is no more than

(*a*) The first edition of "Williams on Real Property" was published in 1845, and the thirteenth, the last edition prepared by the late author himself, in 1880.

a development of the late author's plan, and much of what he wrote has been preserved (*b*). And throughout the present edition the editor has endeavoured to harmonise the old matter and the new, so as to carry out, as far as possible, the late author's idea in projecting the original work—*viz.*, to write a readable book, and one intelligible to a student without previous knowledge of the law.

The editor must gratefully acknowledge the benefit his work has derived from the criticism of his friend Mr. F. W. Maitland, Downing Professor of the Laws of England at Cambridge, who was kind enough to read some portions of the book in manuscript.

An entirely new index to the book and to the cases, year-books, and statutes cited has been prepared by Mr. Kenneth F. Wood, of Lincoln's Inn, to whom the editor is also indebted for much efficient help in passing the work through the press.

A few cases, decided since the text was in print, are referred to in the *Addenda*, by the aid of which the work is brought down to the date given below.

7, Stone Buildings, Lincoln's Inn,
28th June, 1892.

(*b*) The late author's Appendices are untouched.

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TABLE OF ABBREVIATIONS.

Except where otherwise stated, the works, of which the method of citation is here explained, are Reports, and the names given are the Reporters' names.

A. C.	Appeal Cases after 1890. See under L. R.
A. & E.	Adolphus and Ellis, Q. B., 1841—52.
A.-G.	Attorney-General.
Amb.	Ambler, Ch., 1737—83.
And.	Anderson, C. P., 1534—1604.
Anst.	Anstruther, Ex., 1792—7.
App. Cas.	See L. R.
Ass.	Liber Assisarum.
Atk.	Atkyn, Ch., 1736—54.
B. & A.	Barnewall & Alderson, K. B., 1817—22.
B. & Ad.	Barnewall & Adolphus, K. B., 1830—4.
B. & C.	Barnewall & Cresswell, K. B., 1822—30.
B. & P.	Bosanquet & Puller, C. P., 1797—1804.
B. R.	Bancum Regis, the King's Bench.
B. & S.	Best & Smith, Q. B., 1861—9.
Bac. Abr.	New Abridgment of the Law by Matthew Bacon, Gwillim & Dodd's Edition in 8 vols.
Bac. Tr.	The Law Tracts of Lord Bacon.
Beav.	Beavan, Rolls Court, 1838—66.
Bing.	Bingham, C. P., 1822—33.
Bing. N. C.	Bingham, New Cases, C. P., 1834—40.
Black. Comm.	Blackstone's Commentaries.
Bligh, N. S.	Bligh, New Series, H. L., 1827—37.
Bract.	Bracton de Legibus.
Britt.	Britton's Treatise.
Bro. Abr.	Brooke's Abridgment.
Bro. C. C.	Brown, Ch., 1778—94.
Brod. & Bing.	Broderip & Bingham, C. P., 1819—22.
Bulst.	Bulstrode, K. B., 1609—39.
Burr.	Burrow, K. B., 1756—72.
C.	Chancellor.

C. B.	The Common Bench or Court of Common Pleas, also the Common Bench Reports, 1846—56.
C. B., N. S.	Common Bench, New Series, 1856—65.
C. J.	Chief Justice.
C. M. & R.	Crompton, Meeson & Roscoe, Ex., 1834—5.
C. P.	Common Pleas. See under L. R.
C. P. Coop.	C. P. Cooper, Ch., 1837—8.
C. P. D.	Common Pleas Division.
C. & J.	Crompton & Jervis, Ex., 1830—2.
C. & M.	Crompton & Meeson, Ex., 1832—4.
C. & P.	Carrington & Payne, Nisi Prius, 1823—41.
Ca. t. Talb.	Cases in time of Lord Talbot, Ch., 1833—37.
Cal.	Calendar of Proceedings in Chancery published by the Record Commission.
Cary	Cary, Ch., 1556—1604.
Ch.	Chancery. See under L. R.
Ch. D.	Chancery Division. See under L. R.
Cha. Ca.	Cases in Chancery, 1660—88.
Cha. Rep.	Reports in Chancery, 1615—1712.
Cl. & Fin.	Clark & Finnelly, H. L., 1831—46.
Co.	Coke's Reports, generally cited as Rep.—the Reports par excellence.
Co. Cop.	Coke's Complete Copyholder.
Co. Litt.	Coke upon Littleton.
Co. Tr.	Coke's Law Tracts.
Coll.	Collyer, Ch., 1844—6.
Com.	Comyns, K. B., 1695—1740.
Com. Dig.	Chief Baron Comyn's Digest of the Law.
Conn. & Laws.	Connor & Lawson, Ir. Ch., 1841—3.
Coop.	G. Cooper, Ch., 1815.
Cowp.	Cowper, K. B., 1774—8.
Cox	Cox, Ch., 1744—97.
Cro. El. Cro. Jac. Cro. Car.	Croke's Reports in time of Elizabeth, James I. and Charles I., K. B., 1581—1641.
Cru. Fi. Cru. Rec.	Cruise on Fines and Recoveries.
Dart, V. & P.	Dart on Vendors and Purchasers.
De G. & J.	De Gex & Jones, Ch., 1857—9.
De G., F. & J.	De Gex, Fisher & Jones, Ch., 1859—62.
De G., M. & G.	De Gex, Macnaghten & Gordon, Ch., 1851—7.
De G. & S.	De Gex & Smale, Ch., 1846—52.

Dig.	The Digest of Justinian.
Dom. Proc.	Domus Procerum, the House of Lords.
Dougl.	Douglas, K. B., 1778—85.
Dow. & Ryl.	Dowling & Ryland, K. B., 1822—7.
Drew.	Drewry, V.-C. Kindersley, 1852—9.
Drew. & Sma.	Drewry & Smale, same Court, 1859—65.
Dru. & War.	Drury & Warren, Ir. Ch., 1841—3.
Drury	Drury, Ir. Ch., 1843—4.
Dyer.	Dyer, K. B., 1513—82.
E. & B.	Ellis & Blackburn, Q. B., 1852—7.
E. B. & E.	Ellis, Blackburn & Ellis, Q. B., 1858.
East	East, K. B., 1800—12.
Eden	Eden, Ch., 1757—66.
Eq. Ca. Ab.	Equity Cases Abridged, 1667—1744.
Esp.	Espinasse, Nisi Prius, 1793—1807.
Ex.	The Court of Exchequer, also the Exchequer Reports, 1847—56.
Ex. D.	Exchequer Division. See under L. R.
F. N. B.	Fitzherbert's Natura Brevium.
Fearne, C. R.	Fearne on Contingent Remainders and Executory Devises. Butler's Edition.
Finch L.	Finch's Law.
Fitz. Abr.	Fitzherbert's Abridgment.
Fleta	The anonymous treatise on English Law, so called, of the time of Edw. I.
Fonbl. Eq.	Fonblanque's Edition of the Anonymous Treatise on Equity.
Freem.	Freeman, Ch., 1660—1706.
Gai.	The Commentaries of Gaius.
Giff.	Giffard, V.-C. Stuart, 1857—65.
Gilb. Ten.	Chief Baron Gilbert's Treatise on Tenures.
Gilb. Uses	Chief Baron Gilbert's Treatise on Uses.
Glanv.	The treatise on English Law of the time of Henry II., attributed to Glanville.
H. Bl.	Henry Blackstone, C. P., 1788—96.
H. L.	The House of Lords. See under L. R.
H. L. C.	House of Lords Cases, 1847—66.
H. & C.	Hurlstone & Coltman, Ex., 1862—6.
H. & N.	Hurlstone & Norman, Ex., 1856—61.
Hale, P. C.	Sir Matthew Hale's Treatise on Pleas of the Crown.
Hard.	Hardres, Ex., folio, 1655—69.
Hare	Hare, Ch., 1841—53.
Hil.	Hilary Term.

Hob. . . . . Hobart, K. B., 1603—5.

Inst. . . . . Coke's Institutes; also used for Justinian's Institutes.

Ir. . . . . Irish.

J. . . . . Justice.

J. & H. . . . . Johnson & Hemming, V.-C. Wood, 1859—62.

J. & W. . . . . Jacob & Walker, Ch., 1819—21.

J. B. Moore . . . . J. B. Moore, C. P., 1817—27.

Jac. . . . . Jacob, Ch., 1821—2.

Jarm. Wills . . . . Jarman on Wills.

Joh. . . . . Johnson, V.-C. Wood, 1858—60.

Jo. & Lat. . . . . Jones & Latouche, Ir. Ch., 1844—6.

Jur. . . . . Jurist Reports, 1837—54.

Jur., N. S. . . . . Jurist Reports, New Series, 1855—66.

K. B. . . . . The Court of King's Bench.

Kay . . . . . Kay, V.-C. Wood, 1853—4.

K. & J. . . . . Kay & Johnson, V.-C. Wood, 1854—8.

Keb. . . . . Keble, K. B., 1661—77.

Keen . . . . . Keen, Rolls Court, 1836—8.

Keil. . . . . Keilway, K. B., 1497—1530.

L. J. . . . . Law Journal Reports from 1823.

L.-J. . . . . Lord Justice.

L. Q. R. . . . . Law Quarterly Review.

L. R. . . . . The Law Reports of the Incorporated Council of Law Reporting, which are usually cited as follows:—

From 1865 to 1875—

L. R., A. & E. . . Admiralty and Ecclesiastical Cases.

L. R., Ch. . . . Cases in the Court of Appeal in Chancery.

L. R., C. P. . . . Common Pleas Cases.

L. R., C. C. R. . . Crown Cases Reserved.

L. R., Eq. . . . Equity Cases.

L. R., Ex. . . . Exchequer Cases.

L. R., H. L., or E. & I. English and Irish Appeals to the House of Lords.

L. R., P. C. . . . Privy Council Cases.

L. R., P. & D., or P. & M. Probate and Divorce Cases.

L. R., Q. B. . . . Queen's Bench Cases.

L. R., Sc. App. . . Scotch Appeals to the House of Lords.

From 1875 to 1890—

(Usually without prefixing L. R.)

App. Cas. . . . Appeal Cases (House of Lords and Privy Council).

Ch. D. . . . Chancery Division Cases.

C. P. D.	Common Pleas Division Cases.
Ex. D.	Exchequer Division Cases.
P. D.	Probate Division Cases, including Admiralty and Ecclesiastical Cases.
Q. B. D.	Queen's Bench Division Cases, including Crown Cases Reserved.

After 1890—
(Prefixing the date of the year only, as):

1891, A. C.	Appeal Cases.
1891, Ch.	Chancery Division Cases.
1891, Q. B.	Queen's Bench Division Cases.
1891, P.	Probate Division Cases.
L. T.	Law Times Reports from 1845.
L. T. R.	Land Transfer Rules.
Lane	Lane, Ex., 1605—11.
Leon.	Leonard, K. B., 1540—1615.
Lev.	Levinz, K. B., 1660—95.
Litt.	Littleton's Tenures.
Lord Raym.	Lord Raymond, K. B., 1694—1732.
M. or Mich.	Michaelmas Term.
M. & Cr.	Mylne & Craig, Ch., 1836—40.
M. R.	Master of the Rolls.
M. & S.	Maule & Selwyn, K. B., 1813—17.
M. & W.	Meeson & Welsby, Ex., 1836—47.
Mac. & G.	Macnaghten & Gordon, Ch., 1849—51.
McCleland	McCleland, Ex., 1824.
Mad. Form. Ang.	Madox's Formulare Anglicanum.
Madd.	Maddock, Ch., 1815—20.
Man. & Gr.	Manning & Granger, C. P., 1840—5.
Mer.	Merivale, Ch., 1815—17.
Mod.	Modern Reports, K. B., C. P. & Ch., 1669—1744.
Moo.	Sir Fr. Moore, K. B., 1512—1621.
Moo. & Malk.	Moody & Malkin, Nisi Prius, 1826—30.
Moo. & Scott	Moore & Scott, C. P., 1831—4.
My. & K.	Mylne & Keen, Ch., 1833—5.
Nev. & Man.	Neville & Manning, K. B., 1832—6.
N. C.	Bingham's New Cases, C. P., 1834—40.
N. R.	Bosanquet & Puller's New Reports, C. P., 1804—7.
O. Bridg.	Sir Orlando Bridgman's Judgments, C. P., 1660—7, edited by Bannister.
Owen	Owen, K. B. & C. P., 1556—1615.
P.	Probate. See under L. R.

P. & M. Hist. Eng. Law	Pollock & Maitland's History of English Law, 1895.
P. C.	Privy Council. See under L. R.
P. D.	Probate Division. See under L. R.
P. Wms. or P. W.	Peere Williams, Ch., 1695—1735.
Parker	Parker, Ex., 1743—67.
Pasch.	Easter Term.
Per. & Dav.	Perry & Davison, Q. B., 1838—41.
Perk.	Perkins's Profitable Book.
Ph.	Phillips, Ch., 1841—9.
Plowd.	Plowden, K. B., 1550—80.
Pollexf.	Pollexfen, K. B., 1670—84.
Popham	Popham, K. B., 1592—1627.
Pre. Cha.	Precedents in Chancery, 1687—1722.
Prec. Conv.	Precedents in Conveyancing.
Prest. Abstr.	Preston on Abstracts of Title.
Prest. Conv.	Preston on Conveyancing.
Price	Price, Ex., 1814—24.
Q. B.	The Court of Queen's Bench; also the Queen's Bench Reports, 1841—52. See under L. R.
Q. B. D.	Queen's Bench Division. See under L. R.
R.	Rex or Regina.
R. R.	The Revised Reports.
R. S. C.	Rules of the Supreme Court.
R. & M. or Russ. & My.	Russell & Mylne, Ch., 1829—31.
Reg.	The Register of Writs.
Rep.	The Reports of Lord Coke, K. B., 1579—1616.
Ro. Ab.	Rolle's Abridgment.
Rob. Gav.	Robinson on Gavelkind.
Rop. Husb. & Wife	Roper's Treatise on the Law of Husband and Wife, edited by Jacob.
Rot. Hund.	Rotuli Hundredorum, the Hundred Rolls (Record Commission).
Rot. Parl.	Rotuli Parliamentorum, the Rolls of Parliament.
Russ.	Russell, Ch., 1826—9.
S. & S. or Sim. & Stu.	Simons & Stuart, Ch., 1822—6.
S. C.	Same case.
Salk.	Salkeld, K. B., 1689—1711.
Sand. Uses	Sanders on Uses and Trusts. 4th ed.
Sax. Chro.	The Saxon Chronicle.
Sch. & Lefr.	Schoales & Lefroy, Ir. Ch., 1802—6.

Scriv. Cop.	Scriven on Copyholds, 3rd Ed.
Shep. Touch.	Sheppard's Touchstone of Common Assurances.
Sid.	Siderfin, K. B., C. P. & Ex., 1657—70.
Sim.	Simons, Ch., 1826—49.
Sir. T. Raym.	Sir Thomas Raymond, K. B., 1660—84.
Sm. & Giff.	Smale & Giffard, V.-C. Stuart, 1852—7.
Spence, Eq. Jur.	Spence's Equitable Jurisdiction.
Stark.	Starkie, Nisi Prius, 1814—23.
Stat.	Statute.
Str.	Strange, K. B., 1716—47.
Style	Style, K. B., 1646—55.
Sugd. Pow.	Sugden (afterwards Lord St. Leonards) on Powers, 8th ed.
Sugd. V. & P.	Sugden (afterwards Lord St. Leonards) on Vendors and Purchasers, 14th ed.
Swanst.	Swanston, Ch., 1818—9.
T. & R.	Turner and Russell, Ch., 1822—4.
T. R.	Term Reports by Durnford and East, K. B., 1785—1800
Tau. or Taunt.	Taunton, C. P., 1807—19.
Times L. R.	Times Law Reports, from 1884.
Toth.	Tothill, Ch., 1559—1646.
Trin.	Trinity Term.
Turn.	Turner, Ch., 1822—3.
Tyr.	Tyrwhitt, Ex., 1830—5.
Ulp. Frag.	Ulpiani Fragmenta.
V. & B.	Vesey & Beames, Ch., 1813—4.
V.-C.	Vice-Chancellor.
Vaughan	Vaughan, C. P., 1666—73.
Ventr.	Ventris, K. B., 1668—91.
Vern.	Vernon, Ch., 1680—1716.
Ves. or Ves. Sen.	Vesey, Ch., 1747—55.
Ves. Jun.	Vesey Junior, Ch., 1789—1816.
Vin. Abr.	Viner's Abridgment.
Vinogradoff, Vill. in Eng.	Villainage in England, by Vinogradoff, 1892.
W. Bl.	Sir William Blackstone, K. B., 1746—80.
W. N.	The Weekly Notes of the Council of Law Reporting.
W. R.	The Weekly Reporter, from 1852.
Watk. Cop.	Watkins on Copyholds.
Watk. Des.	Watkins on Descent.
Wightw.	Wightwick, Ex., 1810—1.

Willes	Willes, C. P., 1737—58.
Wils.	Wilson, K. B. & C. P., 1742—69.
Wms. Conv. Stat.	Williams's Conveyancing Statutes.
Wms. Exors.	Williams on Executors.
Wms. Pers. Prop.	Williams on Personal Property.
Wms. Saund.	Saunders, K. B., 1666—73, Edited by Serjeant Williams and Sir E. V. Williams.
Y. & C. or Y. & C. Ex.	Younge & Collyer, Equity Ex., 1833—41.
Y. & C. C. C.	Younge & Collyer, Ch., 1841—3.
Y. & J.	Younge & Jervis, Ex., 1826—30.
Y. B.	Year Book.

ERRATA.

Page 83, note (*b*)	*For* "Littledale" *read* "Lidderdale."
„ 358, line 23	At beginning of line *add* "to."

ADDENDA.

Page 82, note (*x*)	*Add* "*Montefiore* v. *Guedalla*, 1901, 1 Ch. 435."
„ 120, note (*g*)	It has been held that a tenant for life is not "impeachable for waste" within the meaning of the section here referred to as regards open mines; *Re Chaytor*, 1900, 2 Ch. 804.
„ 193, note (*r*)	See *Re Fuller*, 1900, 2 Ch. 551.
„ 208, note (*u*)	The operation of the Order has been postponed as regards the City of London to 1st Jan., 1902; see Order in Council of 9th March, 1901; W. N. 23rd March, 1901.
„ 242, note (*v*)	*Add* "*Stamford* v. *White*, 1901, P. 46."
„ 245, note (*f*)	*Re Scott* has been affirmed, 1901, 1 Q. B. 228.
„ 285, note (*l*)	See *Jennings* v. *Mather*, 1901, 1 Q. B. 108.
„ 493, note (*r*) „ 504, note (*r*) „ 510, note (*t*)	See L. T. R. 1899, rule 60.
„ 568, note (*i*)	See *Warren* v. *Brown*, 1900, 2 Q. B. 722.
„ 579, note (*h*)	See also *Re Richardson*, 1900, 2 Ch. 778; *Re Money Kyrle's Settlement*, *ib.* 839.

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE NATURE OF REAL PROPERTY OR ESTATE AND CHATTELS REAL.

Section I.

Of the Nature of Property and Ownership.

It is probable that many of those who open this book, have heard of a distinction made in law between real and personal property. They are perhaps aware that the law of real property has to do with the ownership of land; and it is very unlikely that they have formed no opinions on the subject of the laws of property. Popular notions of law often contain an element of truth; but they are rarely exact. The student of real property law will, therefore, do well to begin by considering the exact meaning of one or two terms, with the common use of which he is doubtless familiar.

In the first place, what is meant by the word *property?* The common conception of property may perhaps be said to be this: that a man's property is what is his own to do what he likes with. It is

Ownership.

generally understood that those things are a man's property, which are the object of *ownership* on his part. What, then, is ownership? Without pretending to formulate a definition, we may venture to assert that ownership chiefly imports the right of exclusive enjoyment of some thing (*a*). The owner in possession of a thing has the right to exclude all others from the possession or enjoyment of it; and if he be wrongfully deprived of what he owns, he has the right to recover possession of it from any person. This right to maintain or recover possession of a thing as against all others may, I think, be said to be the essential part of ownership. As regards its other incidents, ownership may be absolute or else limited or restricted. Thus absolute ownership would seem to include the right of *free*, as well as exclusive, enjoyment; by which I mean the right of using, altering, or destroying the thing owned at the owner's pleasure, so only that he do not violate any other person's right to security of person and property. But those who have rights of exclusive, though restricted, enjoyment, are nevertheless commonly termed owners (*b*). Another incident of absolute ownership is free power of disposition, that is, the right of the owner to transfer as he will the whole or any part of his rights over the thing owned. And in modern times free power of disposition is generally incident to, and indeed inseparable from, any ownership (*c*). But the student will find that in earlier times those were regarded as owners whose right to maintain or recover possession was secured by law, though their power of disposition was limited (*d*).

Incidents of absolute ownership.

(*a*) See 2 Austin's Jurisprudence, 817, 4th ed.; P. & M. Hist. Eng. Law, ii. 4—10, 151 & n. (2); and an article by the writer in L. Q. R. xi. 223.

(*b*) English landlords, who are tenants for life, are commonly called landowners, notwithstanding that they may be restrained from laying their land waste, or pulling down their houses.

(*c*) Litt. s. 360: Co. Litt. 223 a; *Bradley* v. *Peixoto*, 3 Ves. jun. 324; *Ross* v. *Ross*, 1 J. & W. 154; *Ware* v. *Cann*, 10 B. & C. 433.

(*d*) Glanv. i. 5, 7, vii. 1, 5.

Again, it is essential to absolute ownership that it should be of indeterminate duration; no limit of time must be set beyond which the enjoyment of the thing owned shall not endure. So that any right of user or enjoyment limited to endure for any period of life or years cannot amount to absolute ownership, which is interminable. And any right of exclusive enjoyment of a thing, for whatever period, which is derived out of the ownership of another (*e*), seems to fall short of absolute ownership. But the term *owners* is commonly used to include those who have the right of exclusive enjoyment of anything for a limited time, as well as absolute owners (*f*). Thus the word *ownership* is used by lawyers sometimes in the strict sense of absolute ownership, sometimes in a looser sense to express a right of exclusive enjoyment which, though possibly lacking some of the incidents of absolute ownership, includes at least the right to maintain or recover possession of some thing as against all others.

Having gained some notion of the legal sense of *ownership*, let us see what meaning is attached in law to the term *property*. This word is mainly used by lawyers in three different senses:—(1) As denoting the right of ownership. For instance, if a man lend his goods to a friend, it is said that the *property* in the goods remains in the lender. We also speak of *property* in land. (2) As denoting the object of a Property.

xii., xiii.: Bract. fo. 3 a, 8 b, 10 b. 31, 102, 112 b. 113 a, 160 a, 195 b. 206, 263, 268, 434 b. 435 a; Britt. liv. 2, ch. 16, s. 2; Mirror, ch. 2, s. 25; Litt. ss. 9, 10: Co. Litt. 17 a. 266 a: P. & M. Hist. Eng. Law, ii. 4—10.

(*e*) As where one holds land on lease from another for a term, say, of a thousand years, on the expiration of which the lessor's successors in title will have the right to resume possession of the land; or where one man and his heirs hold land of another and his heirs, so that, on failure of the heirs of the former, the latter or his successors in title will have the right to resume possession of the land.

(*f*) English landlords, who are mostly tenants for life only, are commonly called landowners: see P. & M. Hist. Eng. Law, ii. 7—10: stats. 6 & 7 Will. IV. c. 71, s. 12: 8 & 9 Vict. c. 18, ss. 3, 79, 84, 127; 27 & 28 Vict.

right of ownership. Thus, it may be said that certain goods are the *property* of a certain man; or, speaking of land, that the *property* of one man adjoins the *property* of another; or that *property* may consist either of immoveable things, as land, or of moveable things, as coined money. (3) As denoting valuable things—things which can be turned into money or assessed at a money value; in other words, rights which may be exchanged for the ownership of money (*g*). It is in this last sense that the word *property* seems to be used when a man speaks of all his property, or of his real as opposed to his personal property (*h*). Property, then, may mean either (1) ownership, or (2) the objects or an object of ownership, or (3) valuable things, according to the context. Now things, according to a classification imported from Roman into English law, are either corporeal or incorporeal. Corporeal things are tangible objects, as land or gold; incorporeal things are those which are intangible, such as legal relations and rights, including legal obligations and rights of action (*i*). And property, as meaning valuable things, includes incorporeal as well as corporeal things (*k*). That is to say, property consists of two kinds of things:—

Things corporeal or incorporeal.

c. 114, s. 8; 33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84; 40 & 41 Vict. c. 31; *Baumwoll Manufactur &c.*, v. *Furness*, 1893, A. C. 17.

(*g*) See Lord Mansfield, *Hogan* v. *Jackson*, Cowp. 299, 307; Savigny, System des heutigen römischen Rechts, vol i., s. 53, pp. 338—340.

(*h*) See *Doe* d. *Wall* v. *Langlands*, 14 East, 370; *Doe* d. *Morgan* v. *Morgan*, 6 B. & C. 512.

(*i*) Bract. fo. 10 b. In modern times this classification of things, as corporeal or incorporeal, has been subjected to adverse criticism, on the ground that it opposes things, considered as the object of rights, to the rights themselves; see Austin's Jurisprudence, 371, 804, 4th ed. The student of any legal system, however, must take it as he finds it. It is idle for him to find fault with ideas which have obtained actual currency therein, and which he is therefore bound to accept as "legal tender." If any such ideas conflict with this sense of what ought to be, he should look for explanation to the history of law.

(*k*) See *Re Earnshaw Wall*, 1894, 3 Ch. 156; and an article by the writer in L. Q. R., xi. 223—228.

(1) tangible things in their owner's possession; (2) valuable rights of various kinds unaccompanied with the possession of anything corporeal. Or, if it be preferred to treat property as an aggregate of rights, the same classification may be propounded in this way:—Property consists (1) of rights of ownership in tangible things clothed with possession; (2) of bare rights or mere rights; rights unaccompanied with possession, which are nevertheless valuable. But it is more in accordance with the treatment of the subject which has obtained in our law (*l*), as well as with common usage, to classify property as consisting of corporeal things, as land or moveable goods, or of incorporeal things, mere rights regarded objectively as a source of profit. Everyone understands that the land and moveable goods, which a man possesses as owner, are part of his property: but he may have other valuable things besides the land and goods in his possession. It is probably within the reader's knowledge that a man may have land let to yearly tenants, or may be entitled to land on the death of some tenant for life. In either case he has a mere right, without the possession of anything corporeal; for the land is in the possession of the yearly tenants or life tenant. But his right to the land, subject to the yearly or life tenancy, is a valuable thing, and is for that reason part of his property. Again, one need be no lawyer to know that a man's property may also include rights of way, of pasture for cattle, or of fishing or shooting over another's land. Everyone reckons debts due to himself as part of his property; and at the present day stocks and shares are forms of property which are familiar to many. All these things, however, are mere rights, unaccompanied with the possession of anything corporeal. Some, as we have seen, are rights over land, of which others are in possession as owners. A debt is nothing more than

(*l*) See Co. Litt. 121 b, 369 a, 374 b.

the right to sue another for money due. What is generally spoken of as a sum of Government stock is properly the right to receive from Government perpetual annuities redeemable on payment of a certain sum, for example, £100 for every £2 15*s.* of annuity. A share in a joint-stock company, regarded as a source of emolument, is a right to receive a certain share of the profits of the company (*m*). All these different rights are however valuable; they may be turned into money and their worth can be assessed in money. Being valuable things, they are reckoned as property. But in including such incorporeal things in property, no heed is paid to the nature of the rights of which they consist; they are simply regarded objectively as sources of profit.

Section II.

Of Property in Land and Goods in English Law.

Distinction in English law between property in lands and property in goods.

Having thus examined the meaning of *ownership* and *property*, our next step towards apprehending the nature of real property will be to advert to the distinction drawn in English law between property in land and property in moveable goods. It is this:—An English subject may enjoy the absolute ownership of goods, but not of land (*n*).

No absolute ownership of land.

The law does not recognise *absolute* ownership of land, unless in the hands of the Crown; and the greatest interest in land, which a subject can have, is an estate in fee simple (*o*), that is

Estate in fee simple.

(*m*) See Wms. Pers. Prop., 30, 38—40, 274, 284, 15th ed.

(*n*) This distinction is not essential. In Roman law, land and moveable goods might be the object of the same *dominium ex jure Quiritium;* Gai. II. §§ 15—25, 40—42: Ulp. Frag. xix. And see P. & M. Hist. Eng. Law, ii. 2—6.

(*o*) Litt. s. 11: Co. Litt. 4 a; *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106, 109.

to say, an estate inheritable by his blood-relations, collateral as well as lineal, according to the legal order of succession, and held feudally of some lord by some kind of service. For by English law, the king is the supreme owner, or lord paramount, of every parcel of land in the realm (*p*); and all land is holden of some lord or other, and either immediately or mediately (*q*) of the king (*r*). But it must not be supposed, because an English subject can have no absolute, interminable and underived (*s*) ownership of land, that proprietary rights in land are unknown to the law. On the contrary, the law secures to every one, who holds an estate in land, the exclusive enjoyment of his holding, and gives him the right to maintain or recover possession thereof against all others (*t*). To an estate in fee simple there are moreover now incident the rights of free enjoyment and free disposition; so that such an estate is well-nigh equivalent to absolute property (*u*). It is common to speak of land-owners and the ownership of land; and such expressions are found even in Acts of Parliament (*x*). English law then recognises property in but not absolute ownership of land; the most absolute property in land that a subject can have is but an estate (*y*). Here may be explained what is meant by this word *estate*, which will be constantly encountered by the student of real property law. Everyone knows that a man's lands are often referred to as his estate or his estates; but the popular sense of the word is a modification of its legal meaning. Estate is the Latin word *status* (*z*), which originally

Lord paramount.

Estate.

(*p*) Co. Litt. 65 a.

(*q*) That is either directly of the king, or directly of some intermediate, or *mesne* lord, between the tenant and the king.

(*r*) Co. Litt. 93 a, see P. & M. Hist. Eng. Law, i. 210—212.

(*s*) See *ante*, p. 3.

(*t*) 3 Black. Comm. 167 *sq.*, 209.

(*u*) See *ante*, p. 2.

(*x*) See Co. Litt. 17, 266 a, 369 a; *Overseers of West Ham* v. *Iles*, 8 App. Cas. 386; stats. 38 Geo. III. c. 5, s. 46; 58 Geo. III. c. 45, ss. 39, 60; 5 & 6 Vict. c. 35, ss. 1, 60 (No. iv., 2, 10, 12); and the stats. cited in note (*f*) to p. 3, *ante*.

Mesne lord.

(*y*) Holt, C. J., 6 Mod. 109.

(*z*) Co. Litt. 9 a, 345 a.

denoted a man's personal condition in law (*a*), but was used to describe, first, the nature of his interest in land, and then the extent of such interest (*b*). In law, a land-holder's estate is his interest in the land, of which he is tenant; and the word is especially used to denote the extent of his interest. Thus a man is said to have an estate for life in land, or an estate of inheritance, as an estate in fee simple; and all his estate in his land is equivalent to all his right therein (*c*). The word *estate* also has a third meaning. It is used to denote the whole of any person's valuable interest in land or goods. A man's whole "estate" is equivalent to all his "property;" it includes all his valuable rights (*d*).

The student, being informed of the distinction drawn in English law between property in land and property in goods, and knowing that real property has to do with the ownership of land, may perhaps be inclined to conclude that real property must be property in land, while property in goods is personal property. Unfortunately the matter is not so simple. Real property certainly is for the most part property in land; but all property in land is not real property. The explanation of this is to be found in the circumstances of our legal history. We must look for the answer to the days of our early common law. This will lead us back to the times immediately following the Norman Conquest, when the doctrine of the feudal tenure of land was established as part of our law; to

(*a*) Glanv. v. 1; Bract. fo. 26 a, 199 b; Fleta, lib. iv., c. 11.

(*b*) Bract. fo. 40 b, 42, 50 b, 262 a. 423 b. 424 a; *Thomas of Weyland's case*, Rot. Parl. i. 66; stat. 27 Edw. III., stat. 2. c. 9; Madox. Form. Angl. Nos. 170, 172, 192; *Rothenhale* v. *Wychingham*, 2 Cal. iii.: P. & M. Hist. Eng. Law, i. 391 ii. 10.

(*c*) Litt. ss. 1, 57, 465—469, 472, 650; Co. Litt. 345; Holt, C. J., 6 Mod. 109, 110.

(*d*) *Kirwan* v. *Johnson*, Style, 293, 294; *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106; *Scott* v. *Alberry*, Comyns, 337, 340; *Patterson* v. *Huddart*, 17 Beav. 210; *Meeds* v. *Wood*, 19 Beav. 215, 225.

the reign of Henry II., when judges of the King's Court were first appointed to sit permanently on the Bench (*e*), and our oldest legal text-book, that attributed to Glanville (*f*), appeared; and to the days of Bracton, who was an English judge under King Henry III., and wrote a treatise of high merit and authority on the laws of England (*g*).

Glanville.

Bracton.

During the three centuries, which followed the Norman Conquest, the public wealth was contained in forms very different from those of to-day. There was

Form of public wealth in eleventh to thirteenth century.

(*e*) The King's Court was originally the tribunal held by authority of the king, as the source of all justice within the realm, before himself or his chief justiciar. In Henry II.'s reign the ordinary legal business of the King's Court was delegated to judges sitting permanently at Westminster; the institution of itinerant judges, visiting every county, was firmly established; and a remedy in the King's Court was given to all freeholders who had suffered unjust dispossession of their land; so that the justice of the King's Court was brought home to the whole people. After Henry III.'s reign the original jurisdiction of the King's Court of Law was divided between its three branches, the Court of King's Bench, Common Pleas, and Exchequer: to be again united in the year 1875 in the High Court of Justice established by the Judicature Acts. The King's Courts of Law have been the chief agents in the development of the common law, which is derived from the ancient customs of the nation recognized and enforced therein as law, and the rules and principles of which have been evolved from the decisions of those courts upon cases submitted to their judgment from the time of their establishment to the present day. The legal reforms initiated by Henry II. had the effect of increasing the importance of the jurisdiction of the King's Court at the expense of that of the local tribunals, such as the county and hundred courts; and resulted in the establishment of a uniform body of judge-made law applicable throughout the land, which gradually superseded the old local customs. The enormous influence of Henry II.'s judicial institutions may be gauged by the fact that Bracton's treatise written in Henry III.'s reign is as much founded on English case law as any modern text book. See Madox, Hist. Exch. ch. i.—iii., xix.; Stubbs, Const. Hist. ch. xi. §§ 118, 121, 125—127, ch. xiii. § 163, ch. xv. §§ 233, 235; Maitland, Bracton's Note Book, Introd. pp. 1—12, 18; Selden Society, Select Pleas of the Crown, Introd. xi. *sq.*; P. & M. Hist. Eng. Law, i. 85—87, 132—139, 167—185.

The King's Court.

The common law.

(*f*) Ranulf de Glanville, chief justiciar of England under Hen. II.: see Dictionary of National Biography, art. Glanville, R. de; P. & M. Hist. Eng. Law, i. 141—145.

(*g*) For an account of what is known of Bracton, see Maitland, Bracton's Note Book, vol. i., p. 13; P. & M. Hist. Eng. Law, i. 185—189.

then no such thing as capital always ready to be expended in wages and materials for work, or invested in Government Stock or in shares in trading companies. Agriculture was the principal industry; and the people were collected in agricultural village communities, each of which supplied itself with all the necessaries of life. In the eleventh century even the dwellers in cities supported themselves by tilling their own lands. But for our present purpose, the most important distinction between those times and our own is that services, for which we are accustomed to regard payment in money as the natural remuneration, were then requited by the bestowal or occupation of a holding of land. Thus lands were given by the Conqueror to his followers to hold in return for military service. The peasantry occupied land, in return for which they were bound to labour on their lord's demesne, that portion of land which he retained in his own occupation (*h*). The village smith or carpenter often occupied a holding of land in return for his trade services; men held lands too on condition of rendering various personal services to their landlord, such as riding with him, holding his court or feeding his hounds (*i*). In fact, the whole social organisation was based on landholding in return for service (*k*). Trade was not unknown, but occupied a subordinate position; and the contracting of trade debts was a matter which concerned a limited class of persons. Property, therefore, was chiefly corporeal (*l*); it consisted of land on the one hand, and on the other of such things as cattle, sheep and horses, ploughs, and other implements of husbandry, house

(*h*) Bract. fo. 263 a; Co. Litt. 17 a; see Vinogradoff, Vill. in Eng., Essay ii., ch. iii.

(*i*) See the Boldon Book, Domesday, iv. 565 *sq.*; Bract. fo. 35 b; Vinogradoff, Vill. in Eng., 322 *sq.*; P. & M. Hist. Eng. Law, i. 262—271; Maitland, Domesday Book and Beyond, 56—58, 75—76, 303—309, 326—332.

(*k*) Cunningham, Growth of English Industry and Commerce, 2—4, 16, 129, 166, 201.

(*l*) See *ante*, p. 4.

furniture, clothes, arms, jewels and precious metals, all of which were known as chattels (*m*) or goods. Chattels.

Now there is a great physical difference between land and chattels or goods. Land is immoveable and indestructible. You may dig holes in land and waste it, but you cannot remove the site of it. Goods on the other hand may always be removed or destroyed. Cows and sheep may be killed and eaten; furniture may be broken up and burnt (*n*). And this physical difference has great importance for the purposes of legal treatment. Land, for instance, must always remain subject to the jurisdiction of the courts of the country where it is situate, and amenable to the process, by which the judgments of such courts are enforced; it can never be withdrawn beyond the reach of the strong hand of the law. A landowner may fly from justice, but he must perforce leave his lands behind (*o*). Goods, however, may always be taken out of the country or destroyed, in order to avoid seizure by process of law. So that to one wrongfully dispossessed of land the law can always restore the very land from which he has been ejected: but there is no certainty of recovering by legal process the actual goods of which a man has been unlawfully deprived. If they have been lost or destroyed, the law can give the injured owner no other relief than to award him compensation in money. Again, land is permanent; it lasts beyond the life of man; the same land sustains successive generations of men. A landowner may die, but the land always remains to be enjoyed by some other; and from the nature of

Physical difference between land and moveable goods.

(*m*) Du Cange. Gloss. sub. verb. Catalla: New English Dictionary (Murray) s. v. Chattel and Cattle; Dial. de Scaccario, II. xiv.; Stubbs, Select Charters, 236, 2nd ed.; P. & M. Hist. Eng. Law, ii. 149, 150.

(*n*) "*Terre demurt terre tout temps, mes biens come boefs ou vache puit estre mange;*" Fitz. Abr. Villenage, pl. 22.

(*o*) The possession of freehold land was therefore regarded as a sufficient pledge for good behaviour: Bract. fo. 124 b.

things, possession of land must be held by a succession of owners. But goods lack the permanent quality of land; they may always be worn out, destroyed or lost; they are not things which must necessarily endure beyond their owner's life. Lastly, in times when or in countries where men support themselves mainly by pastoral or agricultural pursuits, land is the most important kind of property. We shall see that the distinction made in our law between property in land and property in goods arises from the physical difference between land and moveable goods, and from the superior importance of land at the time when the common law was in the making.

Establishment of feudal tenure.

To re-state in words more indicative of its origin the distinction, that one may be the absolute owner of goods but can at most *hold* an estate in fee in land:—By English law moveable goods are the object of absolute ownership: but land is the object of tenure, that is, feudal tenure. Tenure may perhaps be defined as the relation between feudal lord and tenant of land. The principle of the feudal tenure of land was definitely established in our law after the Norman Conquest. It is well known that, after the battle of Hastings, the lands of those who opposed the Conqueror were treated as forfeited, and were granted by him to his own followers; while those of the English who submitted to him, redeemed their lands, surrendering them and receiving them again from his hands (*p*). In consequence of the revolts against William's authority, which took place in the first ten years of his reign, further forfeitures were incurred; so that, by a gradual process of confiscation and new grant, Normans were largely substituted for English, as the chief landowners over the whole kingdom (*q*). Now

(*p*) Freeman, Norm. Conq. iv. 18—22, 24. v. 22; Stubbs, Const. Hist. § 95.

(*q*) Stubbs, Const. Hist. § 95; Freeman, Norm. Conq. iv. 49, 56, 127, 128, 163, 269.

according to the construction placed by King William and his officers of justice upon the grants or regrants of land made by the king, whether to his own followers or to the former owners, the lands were not bestowed as absolute gifts: but were granted on the conditions of what is known as the feudal system of landholding (*r*). That is to say, the grantees were regarded as holding the lands of the king as lord on the obligation of fidelity and service to him, in which if they failed, the lands would be forfeited and the king might resume them as

The feudal system of landholding.

(*r*) On the continent of Europe the feudal system of landholding seems to have come to maturity in the course of the tenth century. It is thought partly to have originated in the grants of land made by the Frank kings of the three preceding centuries to their kinsmen and followers upon the grantees' undertaking to continue faithful. The estates so granted are known as benefices. Other elements of feudalism are found in the practice of commendation—that is, of men submitting themselves to some powerful neighbour as their lord and thereby gaining protection in return for faithful service.—and in the grants made by kings to powerful subjects of liberty of jurisdiction over the inhabitants of particular districts with immunity from the royal jurisdiction. The main features of the feudal system of tenures were (1) the principle that all land is held, either mediately or immediately, of the king; (2) the union of the relation of lord and man with that of landlord and tenant, whereby the personal service due from the vassal to his superior became the condition of his holding land granted to him by his lord; and (3) the jurisdiction of the lord over his tenants. The personal relation of lord and man was known to English law before the Norman Conquest. And it appears that English institutions were in other respects tending towards feudalism at the time of the Conquest. But the introduction into English law of the feudal principle that all land is held of the Crown, and of the tenure of land by military service, seems to have been the immediate result of the Conquest and of William's dealings with the land. Although William introduced feudal *tenure* into England it should be noted that his policy was opposed to the introduction of feudal *government*. At the assembly held at Salisbury in 1086 he caused all his subjects, *whosoever men they were*, to swear fealty to him as their supreme lord. Hence arose an important difference between the English law of feudal tenure and that prevailing on the continent. The continental tenant owed fealty to his immediate lord only, and might well be summoned to go with his lord to war against the lord's superior, on pain of forfeiture, if he failed to comply. The English tenant did homage to his lord, saving his allegiance to the king; and did not forfeit his holding if he stood by the king against his lord. See Stubbs, Const. Hist. §§ 93—97; Freeman, Norm. Conq. iv. 694; Hallam, Middle Ages, i. 174, 175, and note; Glanv. ix. 1; Bract. fo. 80 a, 81 b; Litt. ss. 88, 89; P. & M. Hist. Eng. Law, i. 5, 6, 19, 37, 43—50, 236—238, 242, 243, 278—280; Maitland, Domesday Book and Beyond, 67 *sq.*, 151 *sq.*, 318 *sq.*

Benefices. Commendation.

his own (*s*). The service required of the grantees would in general be military service: that is, each would be bound to provide the king with a certain number of armed horsemen or knights as part of the feudal host (*t*). Upon this system were lands held of the Conqueror in Normandy by the great men who joined him in the expedition against Harold (*u*). And this system, it appears, was directly introduced into England by William I., at whose will the amount of knight-service due from the feudal tenants of the crown was determined (*x*). And not only was tenure by military service the condition of holding lands, which the king had granted to laymen, but the lands, which he had bestowed upon the bishops and abbots, as his feudal tenants, were also subjected to the obligation of providing definite numbers of knights (*y*). The law of military tenure, having been thus applied to the immediate tenants of the crown, spread quickly downwards; for the king's tenants, in order to provide permanently for knights to perform their service due to the crown, made gifts of land to their followers, as under-tenants, on condition of like military service as was required of themselves (*z*). And so speedily was the law of feudal tenure incorporated in the law of the land that among the grievances to be redressed by the charter issued at the accession of Henry I., we find

(*s*) Stubbs, Const. Hist. § 95; Freeman, Norm. Conq. iv. 27, v. 5, 23, 24.

(*t*) Before the Conquest landowners were subject to the obligation of service in the *fyrd*, or national militia. The *fyrd* was not abolished at the Conquest, but was retained, and used by the Norman kings, in addition to the feudal host; see Stubbs, Const. Hist. §§ 36, 48, 50, 75, 97, 133, vol. i. pp. 76, 105, 117, 189, 268, 432; Stubbs, Select Charters, 153, 2nd ed.

(*u*) Round, Eng. Hist. Review, vi. 441, Feudal England, 260; Stubbs, Const. Hist. § 92; P. & M. Hist. Eng. Law, i. 46—49.

(*x*) This point is, I think, made good by Mr. Round in his articles in the Eng. Hist. Review, vi. 417 and 625, vii. 11, reprinted in his Feudal England, 225 *sq.*; P. & M. Hist. Eng. Law, i. 236—238.

(*y*) The amount of knight service to be required from the bishops and abbots appears to have been fixed by William in 1070; Round, Eng. Hist. Review, vii. 14, Feudal England, 298—299.

(*z*) Round, Eng. Hist. Review, vii. 15, 19, Feudal England, 295, 300.

abuse during the late king's reign of the forms of feudal tenure, with respect to the lands not only of the king's immediate tenants, but also of their under-tenants (*a*). Under the influence of the king's court, of which judges were first appointed to sit permanently in Henry II.'s reign (*b*), the laws of tenure were further developed and reduced to uniformity; and all forms of land-owning, whether derived from the feudal grants of King William and his tenants, or from Saxon usage which had survived the Conquest, were forced to fit the principle of feudal tenure. The law of tenure, however, was applied only to land. Chattels were not treated as fit objects of feudal tenure. The transient nature of goods and the uses to which they are commonly put, were opposed to any such arrangement. They were looked upon as objects of property simply. William I. took plenty of moveable wealth from his conquered subjects: but we do not hear that he granted any of it out to be held of him feudally, though we are told that he bestowed some of it as absolute gifts (*c*). So that, while a free man's land was subject to the interest which his feudal landlord had therein, his chattels were, as we shall see, property peculiarly his own, of which he could dispose at will (*d*).

Section III.

Of Tenements and Chattels.

Land then is the object of tenure. He who has land, is said to hold it rather than to own it (*e*). And

(*a*) Stubbs, Select Charters, 100, 2nd ed.; Round, Eng. Hist. Review, vi. 417; Feudal England, 226—227; P. & M. Hist. Eng. Law, i. 295—297, 306.

(*b*) *Ante*, p. 9, n. (*c*).

(*c*) Freeman, Norm. Conq. iv. 59—62.

(*d*) See Bract. 60 b, 129 a, 131 a, 407 b; P. & M. Hist. Eng. Law, ii. 115—116, 180—181.

(*e*) Co. Litt. 1.

in early times after the Conquest a parcel of land in any person's occupation, with its appurtenant rights in the way of common pasture or otherwise, was especially known as a tenement; a term then used generally in the mere sense of a holding of land without any reference to the nature of the tenant's interest therein (*f*). It must not, however, be supposed that in those days every occupier of land was a feudal tenant. Land might be held on other conditions besides those of feudal tenancy; and the most important kinds of tenancy were three. A man might have a freeholding of land (*liberum tenementum*), a holding in villenage (*villenagium*), or a lease for a certain number or *term* of years (*g*). A freeholding of land was held of the king or some mesne lord by free services, that is, by services free from servile incidents; military service, or knight's service, being in early times the most important kind of service by which land might be freely held (*h*). It was the freeholder who was the feudal tenant of land. To hold in villenage was to hold land of the freeholder on condition of the performance of villein services, which were chiefly services of field labour, as ploughing, sowing, reaping, and mowing, the amount of which was regulated by custom, and which often included incidents (*i*) then regarded as servile (*k*). To hold land for a term of years was to hold under a contract with the freeholder that the tenant should have possession of the land for a certain time (*l*).

Tenement.

(*f*) Bract. fo. 77 b, 80 a, 207 a, 208 b, 220, 263. P. & M. Hist. Eng. Law, i. 215 & n. (1), ii. 146—148.

(*g*) Bract. fo. 207 a.

(*h*) See Glanv. xii. 2, 3; Bract. fo. 7 b, 24 b, 35, 36, 200 a.

(*i*) Such as the merchet, a fine paid by the villein tenant to his lord for the privilege of giving his child in marriage; see Vinogradoff, Vill. in Eng., 153. 203; Pike, Introd. to Y. B., 15 Edw. III. (Rolls series) xv. *sq.*: P. & M. Hist. Eng. Law, i. 354.

(*k*) Bract. fo. 7, 26, 200 a, 208 b, P. & M. Hist. Eng. Law, 1, 337, *sq.*

(*l*) Bract. fo. 220 a.

Now the incidents of these three kinds of holdings of land, the freeholding, the villenage, and the term, were markedly different with respect, first to the protection which the law afforded to the tenant in the possession of his holding, and secondly, to the devolution of the holding after the tenant's death. As we examine these incidents, let us compare them with the same incidents of property in chattels.

Different incidents of freeholding, villenage and term contrasted with those of property in chattels.

1. Only the possession of a freeholding was fully protected by the common law (*m*). The dispossessed freeholder might always bring an action at law to recover his land, not only against the person who had wrongfully turned or kept him out of it, but also against any one who had subsequently got possession of the land by whatever means (*n*); and on establishing his right in such an action, he would be restored to possession by the hands of the sheriff, the officer entrusted to execute the judgments of the king's law court (*o*). The possession of a tenant in villenage was merely precarious in the eye of the law of the land. He was deemed to hold at the will and on behalf of his lord. No direct action for the recovery of a holding in villenage, as such, was ever permitted to be brought in the king's courts of law (*p*). Tenant for a term of years was regarded in early law as

Protection of possession.

(*m*) Glanv. i. 5, xii. 2—5, xiii. 32; Bract. fo. 165 a, 207 a, 431 b.

(*n*) Bract. fo. 102 a, 104 a, 160, 161, 175 b—179, 317 b *sq.*, 327 b *sq.*; P. & M. Hist. Eng. Law, ii. 29—79, especially 45, 53—56, 61—66, where an admirably clear account is given of the remedies by which the mediæval law protected freehold possession.

(*o*) See Glanv. i. 7, 12, 13, 16, 17, 21, 31; ii. 3, 4, 19, 20; xiii. 32—39.

(*p*) Tenant in villenage holding under a covenant with his lord seems to have been allowed to claim in the king's court such protection as was due to him by the covenant: but without such a covenant he was secured in the possession of his holding only by the force of local custom: and if his customary rights were invaded he could only appeal to his lord's court for redress. See Bract. fo. 7 a, 26, 168, 190 a, 200 a, 208 b, 210 b, 263; Fleta. fo. 200; Litt. ss. 77, 172; Maitland, Select Pleas in Manorial Courts (Selden Society), lxxii., 17, 22, 34, 37, 39, 166, 173; Vinogradoff, Vill. in Eng., 45, 46, 70—74, 78—81; P. & M. Hist. Eng. Law, i. 340.

holding possession on behalf of the freeholder as his bailiff, and was never allowed to use the freeholder's remedies for dispossession (*q*). Originally he had no remedy in case of his ejectment, unless he held under a covenant (*r*) with his landlord. If so, he might have an action of covenant against his landlord in case he had been ejected by the landlord himself or anyone claiming the land by superior title; and might recover, in the former case, possession of his holding for the rest of his term, if unexpired, but otherwise damages only (*s*). But afterwards special actions were given to a tenant for years against any person, who had wrongfully ousted him or acquired possession of his land from a wrongful ejector. And though at first it was doubted whether these actions enabled him to recover anything but damages, in the reign of Edward the Fourth it was established that he should therein recover possession of his holding as well (*t*). The owner of chattels might take proceedings, under the early law, to obtain the restitution of stolen or lost goods, into whosesoever hands they came; and in these proceedings he might either accuse the possessor of his goods of theft or sue him civilly, dropping the criminal charge. In the latter case, however, the plaintiff was obliged to set a money value on his goods, on payment of which the defendant would be absolved. But civil proceedings of this nature very soon became obsolete; and thenceforward the dispossessed owner of goods was left to be protected by remedies, in which he could either make no claim but for compensation in money, or in which,

(*q*) Bract. fo. 27 a, 44 b, 165 a, 167 b, 190 a, 210 b, 431 b; Mirror, ch. 5, s. 1, No. 72.

Covenant.

(*r*) A covenant is a contract made in writing authenticated by the seal of the contracting party; Fleta, fo. 130.

(*s*) Bract. fo. 220 a; Bracton's Note Book, Case 1739; Brit. liv. ii. ch. 33; F. N. B. 145 L.

(*t*) See Bract. fo. 220; Y. B. 30 Edw. I. 282; Fitz. Abr. Ejectione Firmæ, P. 6 Rich. II.; Y. B. 7 Edw. IV. 6; 21 Edw. IV. 11; F. N. B. 198, 220 F.; 3 Black. Comm. 200, 201, 207; *Doe* d. *Poole* v. *Errington*, 1 A. & E. 750, 755—757; P. & M. Hist. Eng. Law, ii. 105 *sq.*

though he might claim to recover his goods, the law gave no process, whereby the goods themselves could be attached and restored to him, and he could only recover their value if the defendant refused to render them (*u*).

Succession after death.

2. Although a man might hold land freely, though he held for his life only, yet land, as the object of free feudal tenure, was especially a thing in which a man might have an inheritance. In English law after the Conquest, an estate held feudally was essentially an hereditary estate (*x*); it is to express an estate hereditary as well as feudal that the word *feodum* or *feudum* (*fief* in French, and in English *fee*) was used (*y*). Land held freely and as of inheritance (or as of *fee*, it was said (*z*)), passed on the tenant's death to his *heir;* that is, to the blood relation appointed by law to succeed him according to the legal rules of the descent of a fee. Thus, the eldest son of a tenant by knight's service succeeded as heir to the land of which his father died possessed. And the heir might by action at law recover the very land which descended to him as his inheritance, if the lord of the fee or any intruder wrongfully kept him out of possession (*a*). By the common law, moreover, freeholds of inheritance were not generally devisable by will; they were alienable only by formal delivery of the possession thereof in the tenant's lifetime (*b*). The succession to a holding in villenage after the tenant's death was not a matter in any way regulated by law.

Fee.

(*u*) See Wms. Pers. Prop., 6—20, 15th ed. In the year 1854 the law was altered, and process was given to enforce the return of any chattels wrongfully detained.

(*x*) See Charter of Liberties issued by Henry I. at his coronation, cap. 2, 6; Stubbs, Select Charters, 100, 2nd ed.

(*y*) Glanv., i. 5, vii. 10, ix. 1, 4, x. 2, 3; Bract. fo. 13 b, 62 b, 84, 160 a, 195 b, 207 a, 263 b, 268, 434 b; Britt. liv. 2, ch. 1, § 2; Litt. s. 1; Co. Litt. 1 b; P. & M. Hist. Eng. Law, i. 213—214, 295; Maitland, Domesday Book and Beyond, 152.

(*z*) Bract. fo. 263 b, 264 a; Litt. s. 10; Co. Litt. 17 b.

(*a*) Glanv. vii. 3, xiii. 2, 3; Bract. fo. 62 b, 252 *sq.*

(*b*) Glanv. vii. 1, 5; Bract fo. 39 b, 49 a.

It might be customary for a son or other relation of the tenant to succeed him as heir (*c*): but the customary heir could not appeal to the king's courts against any infringement of his customary right (*d*). The interest of a tenant of land for a term of years was reckoned amongst his chattels after his death (*e*). Now the law of succession to chattels was based on principles entirely different from those which governed the descent of a fee. A man's chattels, as the objects of absolute dominion on his part, were after his death applicable first in payment of his debts. Of any surplus which remained he had the power of disposing of a reasonable part (*f*) by will; and the execution of such a will was committed by law to those persons whom the testator had appointed for the purpose, and who were called his executors (*g*). At first it does not appear that a man's executors succeeded to more than the residue of his chattels left after payment of his debts, his heir being liable to pay his debts and his chattels applicable to that purpose in the hands of his heir (*h*). But afterwards the payment of their testator's debts fell into the executors' hands as well as the distribution of the surplus of his chattels (*i*), and the whole of a testator's chattels devolved upon his executors. The ecclesiastical courts had jurisdiction over suits relating to the validity or

Executor.

(*c*) See Maitland, Select Pleas in Manorial Courts (Selden Socy.), 8, 13, 34, 37, 39, 123, 166, 173, Vinogradoff, Vill. in Eng. 156, 159, 162, 172, 246; P. & M. Hist. Eng. Law, i. 362—364.

(*d*) See Bract. fo. 263, 271 a, 272 a; Britt. liv. 3, ch. 15, § 2.

(*e*) Bract. fo. 407 b; and see fo. 131 a.

(*f*) One third, if he had wife *and* child; one half, if he had wife *or* child: otherwise the whole; Bract. fo. 60 b. 61 a. In process of time, however, a man's widow and children lost their indefeasible rights to a share of his chattels, and anyone, though a husband and father, might now bequeath the whole of his chattels to whomsoever he will; see Wms. Pers. Prop. 416, 15th ed.

(*g*) Glanv. vii. 5—8; Bract. fo. 60, 61; P. & M. Hist. Eng. Law, ii. 333 *sq.*

(*h*) See Assize of Northampton, c. 4; Stubbs, Select Charters, 151, 2nd ed.; Glanv. vii. 5—8; Bract. fo. 60, 61; Selden, Titles of Honour, Pt. II. ch. v. § 21.

(*i*) See Fleta, fo. 125, 126, 135; Britton, liv. 1, ch. 29, s. 35; Y. B. 20 & 21 Edw. I. 374; 21 & 22 Edw. I. 258, 518; 30 Edw. I. 238; P. & M. Hist. Eng. Law, ii. 341—346.

execution of a will (*k*). And if a man died intestate, the administration of his goods was committed to the church (*l*), and performed, after the statute 31 Edw. III. c. 11, by an administrator deputed by the ordinary (*m*) from among the next friends of the deceased. So that the chattels of one who died intestate devolved on his administrator in the same manner as a testator's chattels passed to his executor. The interest of a tenant for a term of years was considered as his chattel, and therefore devisable by will (*n*). And, though it seems that in early times a man's heir might succeed to land given for a term of years to him and his heirs (*o*), yet ultimately the law of succession to a term was assimilated to that of other chattels; and it was settled that the interest of a deceased tenant for years should pass to his executor or administrator, according as he died testate or intestate, even though the land had been given for the term to him and his heirs (*p*). Here we may notice that the devolution of the surplus of an intestate's chattels, after payment of his debts, is quite different from the descent of a fee, as they are divisible amongst his widow and children or next of kin in the manner prescribed by a statute of Charles II. (*q*), enforcing a mode of distribution which the ecclesiastical courts had previously attempted to secure (*r*).

Freeholdings of land, then, or free tenements, were

(*k*) Glanv. vii. 8; Bract. fo. 61 a, 407 b; Fleta. fo. 429, 430; P. & M. Hist. Eng. Law, ii. 329 *sq.*

(*l*) Bract. fo. 60 b; stat. 13 Edw. I. c. 19; Fleta. fo. 124. 136; P. & M. Hist. Eng. Law, ii. 354 *sq.*

(*m*) *I.e.*, "a bishop or any other that hath ordinary jurisdiction in causes ecclesiastical;" Co. Litt. 96 a. After the year 1857 the administrator of an intestate's effects was appointed by the Court of Probate. Since 1875 he has been appointed by the Probate Division of the High Court of Justice. See stats. 20 & 21 Vict. c. 77. s. 4; 36 & 37 Vict. c. 66, ss. 16, 34.

(*n*) Bract. fo. 131 a, 407 b; P. & M. Hist. Eng. Law, ii. 115.

(*o*) Bract. fo. 220 b. 407 b, 408 a; Fitz. Abr. Covenant. pl. 28.

(*p*) Bro. Abr. Chattels, pl. 6; Litt. s. 740; Co. Litt. 46 b.

(*q*) Stat. 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 3. s. 25; 1 Jac. II. c. 17, s. 7.

(*r*) See 1 Sir T. Raym. 497—499; 2 Black. Comm. 515; P. & M. Hist. Eng. Law, ii. 357 *sq.*

the only kind of property in land which was fully recognised and protected by the early common law. The word tenement thus acquired, besides its general meaning of a holding of land, a special sense in which it was used to denote a free tenement only (*s*). And the words "lands" or "lands and tenements" were constantly used as referring to freehold lands only (*t*). So that property in the times of the early common law was classified as consisting of immoveable things, as tenements (meaning free tenements), on the one hand, and moveable things, as chattels, on the other (*u*). As anything which may descend to the heir is in English law called a hereditament (*x*), lands and tenements were also known as hereditaments. And the expression "lands, tenements, and hereditaments" was long and is still used in legal documents to describe property in land, as distinguished from goods and chattels or moveable property. But as by early law freeholdings were the only true property in land, when a man spoke of his lands, tenements, or hereditaments, it was intended, *primâ facie*, that he referred to his freeholds only (*y*).

Hereditaments.

(*s*) Magna Charta of John, art. 34; Stubbs, Select Charters, 301, 2nd ed.; stats. 6 Edw. I. c. 11, 12; 13 Edw. I. c. 1, 3, 4, 6, 10, 32, 41; Co. Litt. 6 a; and see P. & M. Hist. Eng. Law, ii. 146—148.

(*t*) Charter of Liberties of Henry I., art. 2, 4; Stubbs, Select Charters, 100, 101, 2nd ed.; Glanv. viii. 1, 17; Magna Charta of John, art. 4, 5, 9, 32; Stubbs, Select Charters, 297 *sq.*, 2nd ed.; stats. 13 Edw. I. c. 18; 18 Edw. I. c. 1; 25 Edw. III. st. 5, c. 2; 34 Edw. III. c. 12.

(*u*) Glanv. x. 6; stat. 12 Edw. I. c. 8, 10.

(*x*) Co. Litt. 6 a: *Tomkins* v. *Jones*, 22 Q. B. D. 599. This word seems hardly to have come into use before the reign of Edw. IV.; see stats. 39 Hen. VI. c. 1; 1 Edw. IV. c. 1, ss. 4—6, 10, 14. I have not found any earlier instance of its use in the statute book.

(*y*) Y. B. 9 Hen. VII. 25; Bro. Abr. Done 41, Grantes 87; Shepp. Touch. 91, 92; *Rose* v. *Bartlett*, Cro. Car. 292; *Chapman* v. *Hart*, 1 Ves. 271; *Thompson* v. *Lawley*, 2 Bos. & P. 303; 1 Jarm. Wills. 663, 664, 667 *sq.*, 4th ed.; stat. 7 Will. IV. & 1 Vict. c. 26, s. 26.

Section IV.

Of Real and Personal Actions and Property.

To recapitulate the points of contrast between land and moveable goods or chattels in early law:—Land was the object of feudal tenure. The largest property which a subject could hold in land was a fee, which must inevitably descend to his heir if he died possessed thereof. The only true property in land was freehold, for free tenements only were specifically recoverable, the law regarding the possession of a tenant in villenage as enjoyed at the will of his landlord, and that of a termor as matter of contract rather than of property. Chattels were the object of absolute ownership. They might be disposed of by will, and would go to the executor or administrator, not the heir. But they were not specifically recoverable, except in criminal proceedings. The fact that originally freeholds were the only property specifically recoverable, is the reason why they came to be called real things. For the word *real* in English law is used, not in its common sense, in which it is opposed to sham, or imaginary, or ideal, but principally to convey the notion of the capability of specific restitution.

Meaning of word *real* in law.

The terms *real* and *personal* were first applied to actions; and were afterwards extended to things and property with the meanings which they had acquired in connection with actions. Actions in English law were classified as being either real, personal, or mixed. The term real action is simply a translation of the expression *actio realis* used by early writers on English law as equivalent to the term *actio in rem*, which Bracton borrowed from Roman law (*z*). Real actions in English law (*a*) were those in which a man sought to be restored

Real and personal actions.

(*z*) Bracton, fo. 101 b, 159 b; Fleta, fo. 1.

(*a*) In English law real actions were distinguished from personal by the different nature of the relief afforded thereby, and were not classified, as were the *actiones in rem vel in personam* of Roman law, according to the nature of the right therein asserted; see

to the enjoyment of some free tenement of which he had been unjustly deprived (*b*). The mark of a real action was that therein the required restitution might be enforced by the strong hand of the law dealing directly with the very thing claimed: in other words, process of execution (*c*) might issue against the thing demanded (*in rem*). The successful litigant in a real action could have the king's writ commanding the sheriff to put him in possession of the identical holding in respect of which the action had been brought (*d*). Personal actions were brought to enforce an obligation imposed on a man personally to make satisfaction for a breach of contract or a wrong; in other words, they were brought to obtain pecuniary compensation for a violation of right—what the English law calls damages (*e*). Mixed actions were those in which a claim for damages was made along with a claim for the specific recovery of some tenement (*f*). Now it was established in Bracton's time that specific restitution could only be obtained in actions for the recovery of immoveable things or tenements. In civil proceedings for the recovery of moveable things, the defendant might absolve himself, as we have seen, by payment of their value in money. Actions for the recovery of moveable things were accordingly numbered amongst personal actions; for damages only could be recovered with any certainty therein (*g*). Real actions then being for the

an article by the present writer in L. Q. R. iv. 394; P. & M. Hist. Eng. Law, ii. 568.

(*b*) See *ante*, p. 17.

Process of execution.

(*c*) Process of execution is the process of law whereby the *execution* of the judgment of a court of law is obtained; and consists in issuing a writ to the sheriff (see *ante*, p. 17), commanding him to cause such things to be done as shall give effect to the judgment; see Black. Comm. iii. 412, iv. 403; R. S. C. 1883, Order XLII. and App. G., H.

(*d*) Glanv. i. 7, 12, 13, 16, 18, 21, 31; ii. 3, 4, 19, 20; iii. 3—6, 9; xiii. 7—9, 32—39; *ante*, p. 17.

(*e*) See Bract. fo. 102, 114 b; Litt. ss. 492, 502, 503; Co. Litt. 288 b, 289 a; Black. Comm. ii. 438, iii. 117; Bac. Abr. tit. Damages, Trespass.

(*f*) Bract. fo. 102 b, 114 b; Britton, liv. 3, ch. 7, § 1.

(*g*) See Glanv. x. 13; Bract. fo. 102 b; Termes de la Ley, tit.

specific recovery of lands or tenements, and personal actions for the recovery of damages, actions were said to be or to *sound* in the *realty* or in the *personalty*, according as the relief afforded therein were the specific recovery of some thing by process of execution issuing against the very thing demanded, or the recovery of damages against the person of a wrongdoer (*h*). The word *realty* was also used to denote things recoverable in the realty, or specifically; that is, lands and tenements (*i*). Such things were also called things real (*k*). Things recoverable in the personalty, or by action and process against the person who wrongfully withheld them, as moveable goods, debts, damages, and the like, were termed things personal (*l*).

Realty and personalty.

Things real.

Things personal.

Originally, as we have seen (*m*), freeholds were the only things specifically recoverable in the King's Court; all that could be included in "the realty." Thus the word *realty* came to be used as denoting the freehold (*n*). After this, those interests in land which were reckoned as chattels were distinguished by the name of chattels *real*, because, it was said, they concerned the realty; while the name of chattels *personal* was given to moveable goods, "because for the most part they belong to the person of a man, or else" (which seems the better reason) "for that they are to be recovered by personal actions" (*o*). As freeholds descended to the heir, while chattels passed to the executor, the notion of descent to the heir became associated with the realty, as well

Realty equivalent to freehold.

Chattels real and personal.

Action mixt: 3 Black. Comm. 146, 413; *ante*, p. 18.

(*h*) Britt. liv. 2, ch. 1, liv. 3, ch. 7; Litt. ss. 315, 316, 492, 503; Co. Litt. 195 b. 285 a, 288 b, 289 a; Y. B. 3 Edw. IV. 13.

(*i*) Litt. s. 500; Co. Litt. 19 b. 20 a. 118 b.

(*k*) Co. Litt. 288 b.

(*l*) Litt. ss. 496, 497; Y. B. 21 Edw. IV. 83, pl. 38; Co. Litt. 198 a, 288 b. It does not appear that the term *things personal* was so used as to include chattels real; see Wentworth's Office of an Executor (ed. 1641), Tab. I. ch. 4. 10. pp. 64, 70, 130—132; Cro. Car. 293.

(*m*) *Ante*, p. 17.

(*n*) See Litt. s. 500; Co. Litt. 20 a; 5 Rep. 105 b.

(*o*) Co. Litt. 118 b; see Old Tenures, fo. 2 b; Litt. ss. 281, 319—324, 365; 1 Rolle Abr. Executor (H. 1). It is worthy of note that chattels real were things specifically recoverable; see Co. Litt. 43 b. 199; Bac Abr. Guardian (T); *ante*, p. 18.

as the idea of land specifically recoverable; and the incident of passing to the executor became a characteristic of the personalty. So that in later times, when men began to describe property as consisting of real and personal estate instead of by the old terms *lands, tenements, and hereditaments* and *goods and chattels* (*p*), only things inheritable as well as specifically recoverable, only *real hereditaments*, in fact, were classed as real estate; and chattels, whether real or personal, were considered as personal estate rather on the ground of their passing to the executor than with reference to the question, how far they were specifically recoverable (*q*). It does not appear that the expressions *real and personal estate* came into common use much earlier than the reign of Charles II. (*r*). By that time great changes had occurred both in the character of the national wealth and in our land laws. The development of modern commerce and modern capital had commenced. Payment for services was no longer made in terms of land, but in money. Tenure, the relation between feudal landlord and tenant, while remaining in form, had greatly diminished in real importance; the freeholders of land had, in fact, secured all the advantages of absolute ownership, except the form. By an Act passed at the restoration of King Charles II. military tenures had been finally abolished (*s*); a measure which

Use of the terms *real and personal estate*.

Real hereditaments.

(*p*) See *ante*, p. 22.

(*q*) See Cro. Car. 62; 1 Ch. Ca. 16; *Davis* v. *Gibbs*, 3 P. W. 26, 28; *Whitaker* v. *Ambler*, 1 Eden. 151, 152.

(*r*) Mention is found of personal estate and also of real estate in reports of cases decided in Chancery in the time of Charles I.; see 1 Ch. Rep. 15, 25, 42, 71, 73, 82; Cro. Car. 62. In Charles II.'s reign the terms *real and personal estate* were in common use in wills and in the Court of Chancery; see 1 Ch. Ca. 16, 91. 1 Vern. 3, 15, 23, 30, 36, 134, 216, 271. By the commission of sequestration, which was part of the process then issued against persons who acted in contempt of the orders of the Court of Chancery, the sequestrators were authorized to take and keep in sequestration all the *real and personal estate* of the party in contempt: see *Hide* v. *Pettit* (1667), 1 Ch. Ca. 91; Brown's Tutor in Chancery (1688) pp. 341, 361; Praxis Almæ Curiæ Cancellariæ (1694), 89—91.

(*s*) Stat. 12 Car. II. c 24.

relieved freeholders from all the oppressive incidents of feudal tenure, and reduced to a *minimum* the interests of lords in their freeholding tenants' lands. The same Act, too, extended to landowners generally the full liberty of disposing of their fees by will, a privilege before enjoyed only by the more favoured classes among them (*t*); though free power of alienation *inter vivos* had been much earlier obtained (*u*). And while a freehold in fee had come to be well nigh equivalent to absolute property, other forms of property in land, besides freehold, had acquired full recognition and protection in law. Tenure in villenage, as such, had become extinct, but had given rise to the customary tenure known as copyhold. And the right of the copyholder to maintain or recover possession of his holding as against all others had become enforceable by the law of the land (*x*). As we have seen (*y*), the leaseholder had acquired a similar right. So that copyhold and leasehold interests in land had come to be true property in land as well as freeholds. When, therefore, men began to speak of all their valuable rights as their estate (*z*), and to classify their estate as real or personal, property was no longer contained in the simple forms, which had rendered possible the early classification of immoveable tenements and moveable chattels (*a*). And questions arose, on which side of the line the newer forms of property should be ranged. The term *real estate* seems to have been considered as referring primarily to freeholds; yet it was thought to be an apt word to describe copyholds also, where an intention to include them could be inferred (*b*). For

Copyhold.

Real estate.

(*t*) Tenants of fees held in gavelkind, or in burgage where there was a custom to devise the land; and tenants in socage by stats. 32 Hen. VIII. c. 1. and 34 & 35 Hen. VIII. c. 5. which also empowered tenants by knight's service to dispose of two-thirds of their fees. See *ante*, p. 19; and *post*, ch. x.

(*u*) By stat. 18 Edw. I. c. 1.

(*x*) See *post*, Part III.

(*y*) See *ante*, p. 18.

(*z*) See *ante*, pp. 8, 26.

(*a*) *Ante*, p. 22.

(*b*) See *Smith* v. *Baker*, 1 Atk.

copyholds are lands transmissible to heirs; since the copyholder may by custom recognized in law have an estate inheritable by his customary heir, as the freeholder may have an estate inheritable by his heir at common law. By modern statutes, copyholds have been further assimilated to freeholds as regards the incidents of ownership(*c*); and they are now plainly held to be included in real property or estate (*d*). Leaseholds, however, though said to be chattels real as being derived out of real estate, were not permitted to rise beyond their chattel origin and to rank as real estate (*e*); devolving upon the executor, not the heir, they fell into the class of personal estate (*f*).

In modern times then, a man's property or estate (meaning his valuable things (*g*)) is classified as real or personal. Things which are specifically recoverable, and went at common law to the heir, or real hereditaments, are real estate. Personal estate comprises all chattels, which go to the executor (*h*), be they chattels

385; *Ithell* v. *Beane*, 1 Ves. 215; *Byas* v. *Byas*, 2 Ves. 164; *Dod* v. *Dod*, Ambl. 274; *Reid* v. *Shergold*, 10 Ves. 370, 378; *Judd* v. *Pratt*, 15 Ves. 390; *Church* v. *Mundy*, *ib.* 396; *Torre* v. *Brown*, 5 H. L. C. 555, 571.

(*c*) By stat. 55 Geo. III. c. 192, copyholds were made devisable by will without the formalities previously necessary; and by stats. 3 & 4 Will. IV. c. 104; 1 & 2 Vict. c. 110, s. 11, they were made liable to be taken to satisfy their owner's debts; a liability, which had previously attached to them only in the case of his bankruptcy; stat. 13 Eliz. c. 7. s. 2.

Personal hereditament.

(*d*) *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275; *Edwards* v. *Barnes*, 2 Bing. N. C. 252; *Reeves* v. *Baker*, 18 Beav. 372, 382; *Torre* v. *Brown*, 5 H. L. C. 555, 574; *Seaman* v. *Woods*, 24 Beav. 372.

(*e*) Holt, C. J., *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106, 107; Hardwicke, C., *Smith* v. *Baker*, 1 Atk. 385, 386; *Whitaker* v. *Ambler*, 1 Eden, 151; *Parker* v. *Marchant*, 5 Man. & Gr. 498, 2 Y. & C. C. C. 279; *Turner* v. *Turner*, 21 L. J. Ch. 843; *Swift* v. *Swift*, 1 De G. F. & J. 160, 173; *Butler* v. *Butler*, 28 Ch. D. 66.

(*f*) *Lee* v. *Hale*, 1 Ch. Ca. 16; *Davis* v. *Gibbs*, 3 P. W. 26; *Thompson* v. *Lawley*, 2 B. & P. 303; *Prescott* v. *Barker*, L. R. 9 Ch. 174, 190. But at first a lease seems to have been considered a real thing rather than a personal thing: *Rose* v. *Bartlett*, Cro. Car. 292, 293.

(*g*) *Ante*, pp. 4—6.

(*h*) It may be mentioned that there is such a thing as a personal hereditament, a thing recoverable in the personalty, but going to the heir, not the executor: of which an annuity granted to a man and his heirs, and not charged on any land, is an instance. Such things are held to be included in personal, not real.

real, that is, chattel interests in land, or chattels *personal*, namely moveable goods and other things, for the withholding of which damages only are recoverable. Here we must notice that the common law rule of descent to the heir, which was characteristic of real estate (*i*) has been modified by statute. Under the Land Transfer Act, 1897 (*k*), a man's real estate now devolves upon his executors or administrators in the same manner as a chattel real (*l*), and may be sold by them to satisfy his debts, as his chattels may (*m*); but, subject to these incidents, the title of the heir to succeed to his ancestors' realty is not taken away, the executor or administrator being bound to convey the same to the heir, if not required to satisfy debts, or testamentary or administration expenses. So that the beneficial interest in a man's real estate still passes to his heir upon his death and intestacy, and does not go to those entitled to his personalty under the Statutes of Distribution (*n*). And if a man devise his real estate by his will, it will by the same Act nevertheless devolve upon his executors or administrator in the first instance as if it were a chattel real; but the devisee retains the like beneficial interest as the heir has in case of intestacy, and has the same right to require the estate to be conveyed to him, if not wanted to pay the testator's debts or testamentary expenses. It may be noted that personal estate, as well as real, now includes many forms of property which were unknown to the early law, such as stock in the public funds and shares in joint stock companies. These modern forms of property were in most cases created or sanctioned by Act of Parliament, and it was generally

The Land Transfer Act, 1897.

estate. See Y. B. 21 Edw. IV. 83, pl. 38; *Earl of Stafford* v. *Buckley*, 2 Ves. 171; *Aubin* v. *Daly*, 4 B. & A. 59; *Radburn* v. *Jervis*, 3 Beav. 450, 461.

(*i*) *Ante*, pp. 19, 22, 26.

(*k*) Stat. 60 & 61 Vict. c. 65, Part I., applying only to cases of death after the year 1897, and not extending to legal interests in copyholds.

(*l*) *Ante*, pp. 20, 21.

(*m*) See *post*, Part I., ch. ix.

(*n*) These are the statutes mentioned, *ante*, p. 21, & n. (*q*).

declared that they should be considered as personal estate, and should go to the executors or administrators, not the heirs, of the parties entitled to them (*o*). Government stock has also been judicially declared to be of the nature of a mere right of action in the personalty (*p*). By later decisions, a share in a joint stock company has been ascertained to be a right of the same kind (*q*), a mere right to share in the profits of the company, and not to be an interest in land, though the company be landholders (*r*).

Hereditaments, corporeal or incorporeal.

It has been previously mentioned that things are in English as in Roman law distinguished as corporeal or incorporeal (*s*). In our law this classification is particularly applied to hereditaments. Corporeal hereditaments, the land in the freeholder's possession, are contrasted with incorporeal hereditaments, mere rights to or over land, which is in another's possession (*t*). For example, a right to enjoy land in fee upon the determination of the interest of another, who is in possession thereof for his life or for a term of years, is a mere right regarded in law as an incorporeal thing (*u*). So is the right to enjoy in fee land, of which another is wrongfully in possession (*x*). Other

(*o*) See stats. 8 & 9 Will. III. c. 20, s. 33, as to stock in the Bank of England: 9 & 10 Will. III. c. 44, s. 71, as to shares in the East India Company; 1 Geo. I. st. 2. c. 19, s. 9, as to Government annuities; 8 & 9 Vict. c. 16, s. 7; 25 & 26 Vict. c. 89. s. 22.

(*p*) *Dundas* v. *Dutens*, 1 Ves. jun. 196, 198; *Wildman* v. *Wildman*, 9 Ves. 174, 177; *R.* v. *Capper*, 5 Price, 217, 263, 264.

(*q*) *Humble* v. *Mitchell*, 11 A. & E. 205; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, 286, 11 App. Cas. 426, 439, 446. 447.

(*r*) *Bligh* v. *Brent*, 2 Y. & C. 268, 294; *Sparling* v. *Parker*, 9 Beav. 450; *Walker* v. *Milne*, 11 Beav. 507; *Myers* v. *Perigal*, 2 De G. M. & G. 599, 620. 621; *Edwards* v. *Hall*, 6 De G. M. & G. 74; *Entwistle* v. *Davis*, L. R. 4 Eq. 272. But shares in the New River and in one or two more of the older companies are real estate; see *Drybutter* v. *Bartholomew*, 2 P. W. 127; *Buckeridge* v. *Ingram*, 2 Ves. jun. 652.

(*s*) *Ante*, p. 4.

(*t*) Bract. fo. 52. 220 b. 221; Britton, liv. 2. ch. 2. § 1; and see an article by the writer in L. Q. R. xi. 223—230.

(*u*) Bract. fo. 3 a, 7 b, 31, 39 a, 160 a, 264 b; Britt. liv. 2. ch. 2. § 1. ch. 9, §§ 1, 5; Fleta, fo. 201; Litt. ss. 444, 445, 459, 465, 532, 533, 567—575, 606—618.

(*x*) Bract. fo. 262 b, 434 b; Litt. s. 466, 521, 531, 534; Co. Litt. 369 a.

instances of incorporeal hereditaments are a right of common of pasture, which is the right, enjoyed in common with others, to depasture cattle on another's land; a right of way over another's land; a rent granted to a man and his heirs to issue out of another's land; and an advowson, which is the perpetual right of presentation to an ecclesiastical benefice (*y*). The contrast is between the estate of one, who is possessed of the land, the tangible thing, and that of a man who has the mere right, the intangible thing, without possession of anything tangible (*z*). The distinction between corporeal and incorporeal hereditaments was emphasised by a difference in the mode of alienation. The former were at common law alienable by *feoffment*, that is, by gift of a fee or feudal estate, coupled with *livery of seisin*, or formal delivery of possession (*a*). And such rights over others' land as appertained to a holding of land were transferred with it by delivery of the possession of the holding. Thus a right of way or of common enjoyed in respect of any land, or an advowson enjoyed in right of the possession of a manor would pass, without express mention, by delivery of possession of the land or manor. But if it were desired to alienate any incorporeal hereditament alone, apart from the possession of any land, as such things are incapable of delivery, other means of transfer had to be employed (*b*). The most obvious of these was writing; which accordingly came to be necessary to the transfer of incorporeal hereditaments by themselves (*c*). While therefore corporeal hereditaments were long transferable by mere delivery of possession without any written words, the proper mode of disposing of incorporeal hereditaments

Feoffment, with livery of seisin.

(*y*) Bract. fo. 52 b, 53 a, 222; Britt. liv. 2, ch. 3, § 13, ch. 10.

(*z*) See *ante*, p. 5.

(*a*) Glanv. vii. 1; Bract. fo. 39 b; Britt. liv. 2, ch. 2, § 10; Litt. ss. 56, 69, 70; Co. Litt. 9 a, 48 a.

(*b*) See Bract. fo. 52 b—55 b, 102, 222 a; Britt. liv. 2, ch. 8, § 4, ch. 10, § 15; Litt. ss. 183, 184; Co. Litt. 121 b; P. & M. Hist. Eng. Law, ii. 131, 137.

(*c*) See Brit. liv. 2, ch. 3, § 13, ch. 23, § 8.

alone, according to the common law, was by delivery of a sealed (*d*) writing or *deed* of grant. Hence, corporeal hereditaments were said to lie in livery (that is, delivery), incorporeal in grant (*e*). We may note that such incorporeal hereditaments as a right of common or of way, a rent or an advowson, were specifically recoverable by the common law (*f*), and were therefore included in the realty as well as corporeal hereditaments (*g*).

Real and chattel-real property.

We have now seen that property in land is not all real property, but is either real or chattel real; and that copyholds as well as freeholds are now included in real property; while leaseholds are the most important chattels real. But to enjoy the highest and most beneficial form of landowning known to the law, one must have a freehold in fee (*h*). Copyhold and leasehold estates in land are less advantageous, as the reader will discover. Copyholds and chattels real are moreover interests in land derived out of the estate of the freeholder (*i*), for there is no land without a freeholder. For these reasons, it is proposed here to examine first freehold estates in land, leaving the subject of copyholds and leaseholds for subsequent consideration. And we will begin by inquiring into the case of those freeholders who have estates in land in possession, or corporeal hereditaments (*k*).

(*d*) Sealing was required by the common law as a guarantee of authenticity. Therefore whenever the *common law* requires anything to be evidenced by writing, a sealed writing is required: Fleta, fo. 130.

(*e*) Litt. ss. 183, 541, 542, 551, 618, 628; Co. Litt. 9, 121.

(*f*) See Glanv. iv., xii. 13, xiii. 18, 37; Bract. fo. 220 b—232 b, 237 b *sq.*, 432 a; Britt. liv. 2, ch. 23, § 1; Litt. ss. 233, 236.

(*g*) See *ante*, p. 25; Co. Litt. 20 a.

(*h*) Litt. ss. 11, 293.

(*i*) See *ante*, p. 16.

(*k*) *Ante*, p. 30.

PART I.

OF CORPOREAL HEREDITAMENTS.

Terms of the law.

BEFORE proceeding to consider the estates which may be held in corporeal hereditaments or landed property, it is desirable that the legal terms made use of to designate such property should be understood; for the nomenclature of the law differs in some respects from that which is ordinarily employed. Thus a house is by lawyers generally called a *messuage;* and the term *messuage* was formerly considered as of more extensive import than the word *house* (*a*). But such a distinction is not now to be relied on (*b*). Both the term *messuage* and *house* will comprise adjoining out-buildings, the orchard, and curtilage, or court-yard, and, according to the better opinion, these terms will include the garden also (*c*). The word *tenement* is often used in law, as in ordinary language, to signify a house: it is indeed the regular synonyme which follows the term *messuage;* a house being usually described in deeds as "all that messuage or tenement." But the more comprehensive meaning of the word *tenement*, to which we have before adverted (*d*), is still attached to it in legal interpretation, whenever the sense requires (*e*). Again

A messuage.

Tenement.

(*a*) *Thomas* v. *Lane*, 3 Ch. Ca. 26; Keilw. 57.

(*b*) *Doe* d. *Clements* v. *Collins*, 2 T. Rep. 489, 502; 1 Jarm. Wills, 735, 5th ed.

(*c*) Shep. Touch. 94; Co. Litt. 5 b, n. (1); *Smithson* v. *Cage*, Cro. Jac. 526; *Lord Grosvenor* v. *Hampstead Junction Railway Company*, 1 De G. & J. 446; *Cole* v. *West London and Crystal Palace Railway Company*, 27 Beav. 242; see Wms. Conv. Stat. 62.

(*d*) *Ante*, pp. 16, 22.

(*e*) 2 Black Comm. 16, 17, 59.

Land.

the word *land* comprehends in law any ground, soil, or earth whatsoever (*f*); but its strict and primary import is arable land (*g*). It will, however, include castles, houses, and outbuildings of all kinds; for the ownership of land carries with it everything both above and below the surface, the maxim being *cujus est solum, ejus est usque ad cœlum*. A pond of water is accordingly described as *land* covered with water (*h*); and a grant of land includes all mines and minerals under the surface (*i*). This extensive signification of the word *land* may, however, be controlled by the context; as where land is spoken of in plain contradistinction to houses it will not be held to comprise them (*k*). So

Mines.

mines lying under a piece of land may be excepted out of a conveyance of such land, and they will then remain the corporeal property of the grantor, with such incidental powers as are necessary to work them (*l*), and subject to the incidental duty of leaving a sufficient support to the surface to keep it securely at its ancient

Chambers.

and natural level (*m*). In the same manner, chambers may be the subjects of conveyance as corporeal property, independently of the floors above or below them (*n*).

Premises.

The word *premises* is frequently used in law in its proper etymological sense of that which has been before mentioned (*o*). Thus, after a recital of various facts in a deed, it frequently proceeds "in consideration of the *premises*," meaning in consideration of the facts before

(*f*) Co. Litt. 4 a; Shep. Touch. 92; 2 Black. Comm. 17; *Cooke.* dem., *Yates*, vouchee, 4 Bing. 90.

(*g*) Shep. Touch. 92; see Maitland, Domesday Book and Beyond. 388.

(*h*) Co. Litt. 4 b.

(*i*) 2 Black. Comm. 18.

(*k*) 1 Jarm. Wills. 733, 5th ed.

(*l*) *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197, 211.

(*m*) *Humphries* v. *Brogden*, 12 Q. B. 739; *Smart* v. *Morton*, 5 E. & B. 30; *Rogers* v. *Taylor*, 2 H. & N. 828; *Rowbotham* v. *Wilson*, 8 E. & B. 123, 8 H. L. C. 348; *Bonomi* v. *Backhouse*, E. B. & E. 622, 9 H. L. C. 503; *Dugdale* v. *Robertson*, 3 K. & J. 695; *Stroyan* v. *Knowles*, 6 H. & N. 454; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Davis* v. *Treharne*, 6 App. Cas. 460; *Dixon* v. *White*, 8 App. Cas. 833; *Love* v. *Bell*, 9 App. Cas. 286.

(*n*) Co. Litt. 48 b; Shep. Touch. 206. See 12 Q. B. 757.

(*o*) *Doe* d. *Biddulph* v. *Meakin*, 1 East, 456; 1 Jarm. Wills, 734 5th ed.

mentioned; and property is seldom spoken of as *premises*, unless a description of it is contained in some prior part of the deed. Most of the words used in the description of property have, however, no special technical meaning, but are construed according to their usual sense (*p*); and, as to such words as have a technical import more comprehensive than their ordinary meaning, it is very seldom that such extensive import is alone relied on: but the meaning of the parties is generally explained by the additional use of ordinary words.

(*p*) As farm, meadow, pasture, &c.; Shep. Touch. 93, 94.

CHAPTER I.

OF FREE TENURE.

SECTION I.

Of the Origin of Free Tenure.

A FREEHOLDER, who is possessed of land for an estate in fee simple (*a*), is said to be seised thereof in his demesne as of fee (*b*). For to be seised of a thing is to be possessed thereof, the word *seisin* meaning possession; and land in the freeholder's own occupation is said to be in his demesne (*c*). The words *seised* and *seisin* were originally used to describe any kind of possession, whether of land or chattels, or even of a mere right (*d*). But afterwards they came to be used in a limited sense, to express the possession of a freeholding, that possession which alone was recoverable in a real action (*e*). Now the estate of the freeholder seised of land in his demesne as of fee may be considered in two aspects: first, as regards the lord of whom he holds his land; secondly, as regards all other

Seisin.

(*a*) See *ante*, p. 6.

(*b*) Bract. fo. 255 b; Litt. s. 10.

(*c*) Bract. fo. 263 a; Co. Litt. 17 a. As the early law did not recognise the possession of a termor, or a tenant in villenage, land occupied by one or the other was considered in law to remain in the freeholder's demesne. So that to this day the freeholder is seised in his demesne of the land occupied by his leasehold or copyhold tenants: though they can now obtain complete legal protection of their own interests; see *ante*, pp. 18, 27; Vinogradoff, Vill. in Eng., 223; P. & M. Hist. Eng. Law, i. 211, 344.

(*d*) See Maitland, L. Q. R. i. 324; Bract. fo. 206, 252 a, 264 a; Litt. ss. 10, 183, 217, 233, 541, 567; Co. Litt. 369 b.

(*e*) Litt. s. 324; Co. Litt. 17 a, 200 b; see *ante*, pp. 17, 24.

persons. It is proposed first to discuss the relation between the freeholder and his lord, or the free tenure (*f*) of land. For, although in modern legal practice the relation of lord and freeholding tenant is rarely brought into the light, yet the law of tenure determined the form of our present land law. And so long as the form of tenure remains, it is of the first importance that the student should understand the principles which determined its rules.

Principle of tenure introduced by William I.

It has been already mentioned that the first principle of feudal tenure, that all land is held of the crown, was practically introduced into English law by William the Conqueror (*g*), whose grants were construed as conferring a new title to the land (*h*). The grants or regrants of great landed estates made by him to his own followers or to the former owners were interpreted by the royal officers of justice to confer upon the grantees an estate held feudally of the king; so that they became the king's tenants *in capite*, that is, his immediate tenants. The estates so conferred appear to have been estates of inheritance, passing as of right to the heirs of deceased grantees. For the hereditary character of a fief (*i*) had been recognised on the Continent before the Norman Conquest (*k*); so that to the Normans an estate held feudally would be essentially a hereditary estate. And at the very beginning of Henry I.'s reign we find fees established as estates of inheritance in England (*l*).

Tenants *in capite*.

Origin of incidents of free tenure.

The present incidents of free tenure owe their existence to the dealings with free holdings of land, which

(*f*) *Ante*, p. 12.

(*g*) *Ante*, pp. 12—14.

(*h*) Bracton says (fo. 389 b) that the king is not bound to warrant the gift of his predecessors who reigned before the Conquest, for he is not their heir, unless he should have bound himself to warranty by confirmation.

(*i*) *Ante*, p. 19.

(*k*) Stubbs, Const. Hist. § 93. vol. i. p. 254, 2nd ed.

(*l*) See the Charter of Liberties issued by Henry I. at his coronation; Stubbs, Select Charters,

took place between the reign of William the Conqueror and that of Edward I. The relation of feudal landlord and tenant seems to have been essentially restrictive of alienation on the tenant's part: but in England the right of a tenant in fee to alienate his holding without his lord's consent was gradually established (*m*). The steps by which this was accomplished will be described in the next chapter. It is sufficient to say here that it appears that, as a matter of fact, alienation by feudal tenants must have begun soon after the Conquest (*n*); and it is certain that before the close of the period referred to alienation had extensively prevailed (*o*). During this time, however, the alienation of land was rarely accomplished by a transfer of all the owner's rights therein, such as we are accustomed to at the present day, but was usually effected by *subinfeudation*; that is, by the grant of a fee to the grantee and his heirs to be held by them as tenants of the grantor and his heirs. Upon the subinfeudation of a holding the grantor and his heirs remained the tenants of their own superior lord, and a new tenure (*p*) was created between the grantor and the grantee, the former becoming a mesne lord (*q*) between his new tenant and his own superior lord (*r*). The relation of feudal landlord and tenant thus entered into was one of mutual obligation. The lord was mainly bound to warrant his tenant's title to the lands bestowed, and

Subinfeudation.

100, 101. 2nd ed. And see P. & M. Hist. Eng. Law, i. 295—297; Maitland, Domesday Book and Beyond, 309, 317—318.

(*m*) See Bract. fo. 45 b, 46 b, 263 b.

(*n*) Note the large number of instances in Domesday in which *maneria* described as part of the estates of the King's tenants *in capite* are held of them by named undertenants; and see Round, Eng. Hist. Review, vii. 15, 19, Feudal England, 295, 300.

(*o*) The Hundred Rolls bear witness to this.

(*p*) See *ante*, p. 12.

(*q*) *Ante*, p. 7, n. (*q*).

(*r*) Thenceforward the grantor was no longer seised of the land *in his demesne*; but he was said to hold or be seised of the land *in service*, and was regarded as retaining a substantial interest therein: Bract. fo. 80, 81, 263; P. & M. Hist. Eng. Law, i. 211. 291.

to give him lands of equal value if he were ejected by any one who showed a superior title (*s*). The tenant was bound to fealty to his lord, and to do him the services stipulated for on the bestowal of the holding. Thus the nature and amount of the services which could be required of freeholding tenants were determined by the agreements made between lords and tenants, or their respective predecessors, when the tenure between them was created by the gift to the latter of fees to be held of the former; and these services were of innumerable kinds (*t*). Under the influence of the king's court a classification of tenures was gradually accomplished, as we shall see. This was hardly effected, however, before the power of subinfeudation was altogether taken away. By the statute 18 Edw. I. c. 1, called from its opening words the statute of *Quia Emptores*, liberty was given to every free man, who was a tenant in fee simple of land, to sell his holding or part thereof at will (*u*), so nevertheless that the alienee should hold the land of the same immediate lord and by the same services as the alienor held it before. Thenceforward it has been impossible to create a new tenure upon the grant of a fee; for a tenant in fee simple, though enabled freely to part with his land by substituting another tenant in his place, is by this statute restrained from granting his land or any part thereof to another for an estate in fee simple to be held of himself. After the statute, a freeholder in fee could no longer make himself a mesne lord. So that the tenures of fee simple estates, which were in existence just before the statute passed, became, as it were, stereotyped; and the fact, that no

(*s*) See Glanv. ix. 4 Bract. fo. 37, 80 b, 380 b, 381 b.

(*t*) Bract. fo. 35 a.

(*u*) The statute was not construed as giving to the king's tenants *in capite* liberty of alienation without his license; a liberty, which they were afterwards allowed, subject to the payment of a fine; stat. 1 Edw. III. st. 2, c. 12; Co. Litt. 43.

new tenure of an estate in fee simple could be any longer created by agreement, undoubtedly tended to simplify the law of tenure.

We may be helped to a better understanding of the operation of the law of free tenure, if we glance at the different kinds of holding to which it was applied. For William the Conqueror's land settlement consisted rather in the confiscation of landlords' property than in the disturbance of the cultivators of the soil; and his law of feudal tenure at first affected only the chief landowners' estates, leaving the old Saxon customs in force as to subordinate land-holders. But afterwards the law of tenure spread downwards, and was applied to humbler forms of landholding than that usually enjoyed by the great men of the kingdom.

The Domesday survey.

We gather from the Domesday survey, taken towards the end of the Conqueror's reign, that in each county large tracts of land belonged to the king or were held by his tenants *in capite*. The tenant *in capite* was sometimes an ecclesiastical corporation, such as Battle Abbey or St. Paul's Church, sometimes a great noble or other layman. Each tract of land of the king or his tenant *in capite* is described in detail in Domesday book; and is generally found to consist of several holdings which are often called *maneria*, manors, and appear frequently to coincide with the limits of places named in the book, and termed *villæ*, vills (*x*), towns or villages (*y*).

Maneria.

Vills.

(*x*) It should be noted that there were large manors containing several vills, and there were vills containing more than one manor: but in the Home Counties and the Midlands the manor usually coincided with the vill from which it took its name. In the West, however, where the land was occupied in small hamlets and scattered homesteads rather than in true vills, very small holdings were termed *maneria*. And in the Eastern Counties it appears to have been exceptional for a manor to coincide with an entire vill. The exact meaning of the term *manerium*, as used in Domesday, is the subject of controversy. See P. & M. Hist. Eng. Law, i. 584 *sq.*; Maitland, Domesday Book and Beyond, 12 *sq.*, 22, 107 *sq.*, 129, 318 *sq.*; Round, Eng. Hist. Rev. xv. 293.

(*y*) Town is the English for

It is generally stated, with regard to each of such holdings, that there are so many *villani* (*z*), townsmen or villagers, so many *bordarii* or *cotarii*, that is, cottiers, and so many *servi* or bondmen. Sometimes the extent of the holding of the *villanus* is specified. And it is sometimes mentioned that so much land pertains to the demesne of the holder of the manor (*a*). Now it appears that in the common case in which a manor coincided with a vill, it comprised a village together with a parcel of land, which was cultivated upon the common field system of husbandry by the *villani* (*b*). Each *villanus* had a house and a certain quantity of arable land, which lay in scattered strips in the common fields of the vill, of which there were generally three. Besides arable land, the vill usually contained meadow land, also held in strips by the *villani*, but commonable according to the regulations of the community during certain seasons of the year (*c*). In the demesne of the holder of the *manerium* there was usually a mansion, or manor-house, for the occupation of himself or his bailiff, and a certain quantity of arable and meadow land, also in scattered strips. Sometimes the cottiers held a few strips of arable land besides their cottages. The barren lands which adjoined formed the wastes of the vill or manor, over which the cattle of the various tenants were allowed to roam in search of pasture (*d*). In early times after the Conquest, the

Villani.

Bordarii; cotarii; servi.

Lord's demesne.

villa: but what was formerly called a town is what is now usually described as a village. See Maitland, Domesday Book and Beyond, 59, 110; Co. Litt. 33 b, 110 b, 115 b: 1 Black. Comm. 115: Chaucer, Canterbury Tales, Prologue, lines 479—480, 491:—

"A good man was ther of religioun,
And was a poore persoun of a toun.
* * * * *
Wyd was his parisshe, and houses fer asonder."

(*z*) See Co. Litt. 5 b.

(*a*) See especially the survy of Middlesex: Domesday, i. 127—130.

(*b*) Seebohm, English Village Community, ch. i.—iii.; see also Williams on Commons, 39—56, 66—70; P. & M. Hist. Eng. Law, i., 582 *sq.*: Maitland, Domesday Book and Beyond, 15, 337, 379.

(*c*) See Williams on Commons, 79, 84, 90.

(*d*) See Vinogradoff, Vill. in Eng., Essay II., ch. ii.

villanus appears to have generally held his land by performing such services as ploughing the lord's land, and doing other field labour for the lord, and by rent in kind or money (*e*). The conditions on which the *villani* held their lands were the origin of tenure in villenage already noticed (*f*). They have been mentioned here in order to show the nature of the most important kind of freeholding at the time of the Domesday survey, namely, the *manerium* or agricultural estate; which may, perhaps, as regards the estates of the great, be said to have been the unit of free tenure; a large landed estate consisting in those days of a number of *maneria*, as at the present day it consists of a number of farms (*g*). There are, however, many cases in Domesday in which some person named in the survey holds a specified quantity of land as undertenant of the holder of a *manerium;* and such holdings appear to be also freeholdings (*h*). In very many instances the *manerium* described is not in the demesne of the king's tenant *in capite*, but is held of him by some named undertenant, so that the tenant *in capite* has but a mesne lordship in the land of which his tenant is seised in demesne. But it is not common in Domesday to find more than one mesne lord between the freeholder seised in his demesne and the king.

(*e*) Maitland, Domesday Book and Beyond, 56 — 58, 318 *sq.*, 326—332.

(*f*) *Ante*, pp. 16, 17, 19, 20.

(*g*) A *manerium* was in fact in those days the quantity of land which was usually let *to farm*, *ad firmam*, that is, at a certain yearly sum, whenever such a method of getting the profits was adopted. And if not let to farm, it appears to have been worked or administered as a separate entity, apart from its lord's other holdings of a like nature. It should be noted that although in many instances the Norman lords held as manors estates which were so held in King Edward's time, in other cases they appear to have formed manors by throwing together lands occupied before the Conquest by several free tenants: Domesday, i. 8; iii. (Boldon Book), 565; Domesday of St. Paul's, 122 *sq.*; P. & M. Hist. Eng. Law, i. 592, ii. 111; Maitland, Domesday Book and Beyond, 135—138, 149, 161 *sq.*, 318 *sq.*

(*h*) And in most cases to have been held by knight service; see Round, Eng. Hist. Review, vii. 12. 18, 19; Feudal England, 295, 306, 307.

Besides the *maneria* of the great landowners and their undertenants by subinfeudation, there appears in Domesday another kind of freeholding, which, however, is chiefly found in the North-eastern Counties (*i*). This was the holding of the *liber sochemannus* or *liber tenens*, who appears to have been a free man holding, generally, a part of the lands in some manor by light labour services, duties of carriage or riding, or rent in money, and bound besides to do suit of court; that is, to attend the court of his lord or of the hundred in order to assist, as one of its members, in giving judgment (*k*). In addition to agricultural estates and the holdings thereon, we find in Domesday a third species of free holding, namely, houses in cities or boroughs held by the *burgenses* or burgesses, generally at money rents. The law relating to this class of holding was determined by the custom of each particular borough (*l*). The tenure of houses in ancient boroughs was afterwards known as tenure in burgage (*m*), and the customs were often highly advantageous to the holders.

Liber sochemannus.

Houses in boroughs.

Burgenses.

Tenure in burgage.

As we have seen (*n*), when the law of feudal tenure by military service was introduced into England, it was applied first to the estates of the king's tenants *in capite* and the *maneria*, which they contained. By grants and subinfeudation divers sub-manors and smaller estates were created, and new holdings were made by reclamation of waste lands (*o*). In time, a change took

Changes made between the 11th and 13th centuries.

(*i*) Leicester, Lincoln, Norfolk, Northampton, Nottingham, and Suffolk; see Ellis, Introd. to Domesday, ii. 419 *sq.*; Seebohm, Eng. Vill. Comm. 86; Maitland, Domesday Book and Beyond, 66—67.

(*k*) Maitland, Domesday Book and Beyond, 66 *sq.*, 76—79, 129 *sq.*, 130, 134, 140, 303—309, 318 *sq.*, 326—332.

(*l*) See Maitland, Domesday Book and Beyond, 172 *sq.*; Domesday, i. 1 (Dover), 100 (Exeter), 154 (Oxford), 189 (Cambridge), 262 (Chester), 280 (Nottingham and Derby), 336 (Lincoln), ii. 104 (Colchester); Stubbs, Select Charters, 87—91, 110—112.

(*m*) Glanv. xii. 3; Bract. fo. 273 a; Britt. liv. 3, ch. 2, § 10; Litt. ss. 162—171; P. & M. Hist. Eng. Law, i. 275, 629 *sq.*

(*n*) *Ante*, pp. 12—15.

(*o*) See Hearne's Liber Niger Scaccarii, vol. i.; Hundred Rolls,

place in the constitution of the manor of the ordinary type. The condition of the mass of the peasantry was depressed, as a result of the Conquest (*p*); so that in the thirteenth century the *villani* of Domesday Book, who appear to have been free men (*q*), have been succeeded by tenants in villenage, holding their lands by onerous labour services and, as a rule, personally unfree (*r*). And villein labour services, though limited by custom in amount, were partly indefinite in kind (*s*), and, as we have seen, frequently included incidents deemed to be servile (*t*). By the same time, however, an increase had taken place in the number of freeholdings which comprised, not whole manors, but only lands held of a manor; and we find in other manors than those of the Eastern Counties a certain number of men holding freely parts of the manor lands at fixed rents and by occasional agricultural services of a definite kind (*u*). The tenure of these men was named after that of the free sokemen above mentioned, and acquired the name of socage (*x*). And free tenants of this class appear to have increased and spread, and to have become the most prominent members of the village community. Then it had come to be established, with the development of the law of feudal tenure, that every lord should have the right to hold a court for his tenants; and this right was mainly exercised by lords in holding courts for their various manors (*y*). Thus arose the estates, which are now called manors, and to each of which, according to later law, there is necessarily incident a court baron (that is,

Manors.

Court baron.

temp. Edw. I.; Bract. fo. 434; Fleta, lib. iv. c. 15. § 9; P. & M. Hist. Eng. Law, i. 582 *sq.*, 596.

(*p*) Maitland, Domesday Book and Beyond, 61 *sq.*

(*q*) *Ibid.* 43.

(*r*) P. & M. Hist. Eng. Law, i. 337 *sq.*, 395 *sq.*, 413—415.

(*s*) *Ibid.* 348 *sq.*, 353—358.

(*t*) *Ante*, p. 16.

(*u*) See the Hundred Rolls, 7 Edw. I. (Survey of Bedford, Bucks, Cambridge, Hunts, and Oxon).

(*x*) P. & M. Hist. Eng. Law, i. 271 *sq.*: Vinogradoff, Vill. in Eng. 178 *sq.*, 325 *sq.*

(*y*) P. & M. Hist. Eng. Law, i. 558 *sq.*, 572—574.

a lord's court wherein the freeholders are both suitors and judges), and at least two free tenants to act for this purpose (*z*). And every one of these estates is of a date prior to the Statute of Quia Emptores (*a*), except, perhaps, some which may have been created by the king's tenants *in capite* with licence from the crown (*b*). By the time of Edward I. there appears in records such a multiplication of mesne lordships, over burgage tenements as well as manors, and such an increase of freeholding tenants of manors, as clearly shows the large extent to which subinfeudation had prevailed (*c*).

Section II.

Of the Classification of Free Tenures.

King Henry II. not only appointed permanent judges of the King's Court (*d*), but ordained a special remedy in that court for all persons wrongfully disseised of their free tenements (*e*). The King's Court was thus thrown open, as a court of first instance, to the resort of landholders generally (*f*); this caused the various kinds of holding above described to be submitted to the test of a general judge-made law; and so a classification of tenures was gradually accomplished. The first distinction

Classification of tenures.

(*z*) Bro. Abr. Court Baron. pl. 22, Comprise, pl. 31; Co. Litt. 58 a; Kitchen on Courts, vi. 6—8. 105—115; Termes de la Ley, *s.v.* Manor; *Tonkin* v. *Croker*, 2 Ld. Raym. 860, 864; Black. Comm. ii. 90, iii. 33; and see Maitland, Selden Society, vol. ii., lxi. *sq.*; Vinogradoff, Vill. in Eng. 387—390.

(*a*) 18 Edw. I. c. 1.

(*b*) 1 Watk. Cop. 15; *ante*, p. 39, n. (*u*).

(*c*) See the survey of the counties of Bedford, Buckingham, Cambridge, Huntingdon, and Oxford, made in the seventh year of Edw. I. Rot. Hund. ii. 321 *sq.*

(*d*) *Ante*, p. 9, n. (*e*).

(*e*) *Viz.* the assize of novel (or recent) disseisin; Glanv. xiii. 32 *sq.*; *ante*, p. 17, n. (*n*).

(*f*) Before this the King's Court had been mainly for great men and great causes; see P. & M. Hist. Eng. Law, i. 62, 86, 116, 124, 125, ii. 47.

made was between free tenure and tenure in villenage, which was regarded as base or servile tenure: the freeholder only being accorded, and the tenant in villenage denied, the remedy so given (*g*). Free tenures, again, were either lay or else spiritual or ecclesiastical (*h*). Lay tenures were mainly of two kinds—knight's service, and socage. Of spiritual tenures we need only mention *frankalmoign* (*i*).

Classification of free tenures.

Incidents of tenure by knight's service.

The incidents of tenure by knight's service, which was the most honourable species of free tenure, were these:—First, the tenant was bound to discharge the obligation of military service annexed to his holding. The feudal obligation of military service was a royal service due to the king from his immediate military tenants (*k*); and the tenant by knight's service of a mesne lord would generally be bound to perform this royal service, and to acquit his lord therefrom to an extent proportionate to the value of his holding (*l*). In and after the reign of Henry II. the obligation of personal military service seems to have become generally commuted, in the case of the tenants of mesne lords, for a money payment called scutage or escuage (*m*), and assessed first by the Crown, and afterwards by the authority of Parliament (*n*). But scutage and the

Scutage or escuage.

(*g*) Bract. fo. 7, 26, 207 a, 208 b; *ante*, p. 17; see Vinogradoff. Vill. in Eng. 81—83.

(*h*) Glanv. xiii. 23, 25; Bract. fo. 207 a, 286; Co. Litt. 95 a.

(*i*) See Litt. s. 137; P. & M. Hist. Eng. Law, i. 218.

(*k*) See Stubbs, Const. Hist. §§ 96, 133, 162, 238; Madox, Hist. Exch. i. 620; Round, Eng. Hist. Rev. vi. 433; Feudal England, 248; P. & M. Hist. Eng. Law, i. 230 *sq.*, 242, 243.

(*l*) Bract. fo. 36; Round, Eng. Hist. Rev. vii. 11, 12, 15, 19; Feudal England, 295 *sq.*

(*m*) *Scutagium* (in French *escuage*) meaning originally *servitium scuti*, service of the shield. Dialogus de Scaccario I. ix.; Stubbs, Select Charters, 201, 2nd ed.; Litt. s. 95; Madox, Hist. Exch. i. 619.

(*n*) Stubbs, Const. Hist. §§ 161, 162; Madox, Hist. Exch. ch. xvi.; P. & M. Hist. Eng. Law, i. 245—254. It appears, however, that scutage was not first introduced by Henry II.; mention of scutage is found in a charter of Henry I.; and the principle must have existed from the beginning of military tenure: Round, Eng. Hist. Rev. vi. 629 *sq.*; Feudal England, 268 *sq.*

feudal obligation of military service became obsolete after the reign of Richard II., if not earlier (*o*). The military tenant was, moreover, at first expected, and afterwards obliged, to render to his lord pecuniary aids to ransom his person if taken prisoner, to help him in the expense of making his son a knight, and in providing a portion for his eldest daughter on her marriage (*p*). On entering upon his estate, the tenant was bound to do homage to his lord, kneeling to him and professing to become his man; he was also bound to take an oath of fealty to him (*q*). An heir of full age was required to pay a fine, called a relief, on succeeding to his ancestor's estate (*r*). If the heir were under age, the lord had, under the name of wardship, the custody of the body and lands of the heir, without account of the profits, till the age of twenty-one in males, and sixteen in females (*s*). In addition to this, the lord possessed the right of marriage (*maritagium*), or of disposing of his infant wards in matrimony (*t*). And if a male heir refused a suitable match, he was to forfeit a sum of money equal to the value of the marriage—that is, what the suitor was willing to pay down to the lord as the price of marrying his ward; and double the market value was to be forfeited if a male ward presumed to

Aids.

Homage.

Fealty.

Relief.

Wardship.

Marriage.

(*o*) 2 Stubbs, Const. Hist. § 275, p. 521, 2nd ed.; Co. Litt. 72 b; P. & M. Hist. Eng. Law, i. 231, 232, 245—254.

(*p*) Glanv. ix. 8; Bract. fo. 36 b; Magna Charta Joh. art. 12, 14, 15; Stubbs, Select Charters, 298, 299, 2nd ed.; P. & M. Hist. Eng. Law, i. 330. The amount to be taken as aids *pour faire fils cheralier et pour fille marier* were fixed by stats. 3 Edw. I. c. 36, & 25 Edw. III. st. 5, c. 11.

(*q*) Saving always his allegiance to the king; Glanv. ix. i.; Bract. fo. 77 b—80; Litt. ss. 85—94; P. & M. Hist. Eng. Law, 1277 *sq.*; *ante*, p. 13, n. (*r*).

(*r*) Glanv. ix. 4; Bract. fo. 84; Litt. s. 112; P. & M. Hist. Eng. Law, i. 288 *sq.*

(*s*) Glanv. vii. 9—12; Bract. fo. 86; Fleta. fo. 4; Litt. s. 103; P. & M. Hist. Eng. Law, i. 299 *sq.* A wardship, or the interest of a lord in the body and lands of his ward, was regarded as a chattel saleable and devisable by will, and was afterwards classed as a chattel real; Bract. fo. 87 a; Fleta. fo. 6; Britt. liv. 3, ch. 2, § 2; Y. B. 32 Edw. I. 186; Co. Litt. 85 a, 118 b; P. & M. Hist. Eng. Law, ii. 116.

(*t*) Glanv. vii. 12; Bract. 80 b—91 b; Fleta, fo. 9; Britt. liv. 3 ch. 2.

marry without his lord's consent (*u*). If a female heir refused the match tendered by her lord, he might hold her lands until she attained twenty-one, and further until he had taken the value of the marriage (*x*). The king's tenants *in capite* were, moreover, subject to many burdens and restraints, from which the tenants of other lords were exempt (*y*). Again, every lord who had two or more free tenants, had a right to compel them to do suit of court; that is, duly to attend and to aid in transacting the business of the lord's court, or court baron (*z*), wherein his freeholders were judges as well as suitors (*a*). Lastly, on failure of the tenant's heirs, his lord had the right to have the lands again as his escheat (*b*); that is, as falling in to the lord, who or whose predecessors had granted the fee (*c*) now brought to an end for want of heirs. The tenant's heirs might fail either from natural causes or by reason of his or their attainder, or corruption of the blood so as to lose its inheritable quality. This was the legal consequence of judgment of death or outlawry (*d*) for treason or felony, and of abjuring the realm (*e*). Escheat upon attainder was, however, subject to the right of the Crown to hold for a year and a day, and to waste the

Suit of court.

Court baron.

Escheat.

Attainder.

(*u*) Stats. 20 Hen. III. c. 6, 7; 3 Edw. I. c. 22; Litt. s. 110.

(*x*) Stat. 3 Edw. I. c. 22; Co. Litt. 79 a.

(*y*) As for an heir of full age to pay a whole year's profits on succeeding to his ancestor's estate for *primer seisin*: for an infant heir to *sue out his livery* on coming of age, that is, to pay half a year's profits for taking possession: involuntary knighthood in certain cases: and fines for alienation: see Co. Litt. 77 a, 87 a. n. (1): 2 Black. Comm. 66—72.

(*z*) *I.e.*, *Curia Baronis*, the lord's court.

(*a*) *Ante*, pp. 44, 45. For an account of the jurisdiction of the lord's court, see Maitland, Select Pleas from Manorial Courts (Selden Socy.), Introd. xxxviii. *sq.*; Vinogradoff, Vill. in Eng., Essay II. ch. v.: P. & M. Hist. Eng. Law, i. 558 *sq.*

(*b*) P. & M. Hist. Eng. Law, i. 332.

(*c*) *Ante*, p. 38.

(*d*) A criminal who flies from justice may by due process be *outlawed*, or put out of the protection of the law: Bract. fo. 124 *sq.*: 4 Black. Comm. 319.

(*e*) Criminals, who took sanctuary, had the alternative of coming out to stand their trial, or of confessing their crime and abjuring and leaving the realm; Bract. fo. 135. Privilege of sanctuary was finally abolished by stat. 21 Jac. I. c. 28, s. 7.

attainted person's lands—a right usually compounded for (*f*). And the lands of one attainted for high treason were forfeited absolutely to the Crown, and did not escheat to the lord of the fee (*g*).

Grand serjeanty.

Tenure by grand serjeanty (*h*) was reckoned equivalent to knight's service, being subject to the same burden of the lord's right of wardship and marriage. According to Bracton, to hold by grand serjeanty was to hold lands of the king or some other lord by rendering to the king, as royal service, some special service, other than knight's service or scutage, pertaining to the king or the defence of the realm, and valued at five pounds or more (*i*). But in Littleton's day (*k*), grand serjeanty was limited to cases where a man held lands of the king by such services as he ought to do in his own person to the king, as to carry the king's banner, or to be his marshall, or to carry his sword before him at his coronation, or to do other like services (*l*).

Littleton.

Socage tenure.

Free socage appears to have been originally the name of the tenure of the *liberi sochemanni* (*m*), or free sokemen, a class of landholders whose existence dates from before the Norman Conquest, but who were, as we have seen, rarely found at the time of the Domesday survey beyond the range of the north-eastern counties (*n*). Sokemen appear to have got their name from

(*f*) Glanv. vii. 17; Bract. fo. 23, 129, 130; Britt. liv. 1, ch. 6, § 3; Co. Litt. 13 a, 92 b, 390 b, 391 a; 4 Black. Comm. 380; Bac. Abr. Forfeiture, Outlawry (D).

(*g*) Stat. 25 Edw. III. st. 5. c. 2; 3 Inst. 18.

(*h*) See P. & M. Hist. Eng. Law, i. 262 *sq.*, 303, 304.

(*i*) Bracton instances finding the king a man or several men armed, horse or foot, for his army: Bract. fo. 35 b—37 a, 87 b; Fleta, fo. 5; see Britt. liv. 3, ch. 2, § 6 and note, Nichols's ed.

(*k*) Littleton was a judge in the reign of Edward IV., and wrote a treatise on Tenures, which is a book of authority.

(*l*) Litt. s. 153.

(*m*) So called chiefly to distinguish them from the *villani sochemanni* on the ancient demesne of the Crown; see *post*, p. 61, n. (*b*); Vinogradoff, Vill. in Eng. 196.

(*n*) *Ante*, p. 43. There are

the word *soke* (Anglo-Saxon, *sócn*), signifying, as well as a right or liberty of jurisdiction, a duty of seeking or attending a court, and, therefore, applicable to the suit of court, which before the Conquest appears to have been the chief incident of their tenure (*o*). But as early as Bracton's time this derivation of the term was overlooked, and the origin of the word socage was referred to the French word *soc*, a ploughshare (*p*), sokemen being generally engaged in cultivating the land (*q*). Indeed after the Conquest free sokemen are usually found to be holding their lands by yielding rent in money and rendering services, which were generally of an agricultural nature, but fixed in amount and kind, and far less onerous than the labour services of the villeins (*r*). In course of time these services were generally commuted for money payments (*s*). And the class of freeholders, who held parcels of land of the lord of a manor at rent in money or fixed agricultural services, appears to have steadily spread and increased (*t*); whilst at the same time the term *free socage* was extended to denote the tenure of such freeholders,

several instances in Domesday of land having been held in King Edward's time by *sochemanni*, which was not so held at the time of the survey, especially in Bedfordshire and Cambridgeshire; see Domesday, i. 11 a, 13 b, 14 b, 132 b, 134, 140 b, 141, 190, 191, 209—218; Maitland, Domesday Book and Beyond, 62—65, 129 *sq.*, 135.

(*o*) Sommer on Gavelkind, 130 *sq.*, 2nd ed.; 2 Black. Com. 80; Maitland, Select Pleas in Manorial Courts, Selden Society, xxii.; P. & M. Hist. Eng. Law, i. 274; Maitland, Domesday Book and Beyond, 84 *sq.*; *ante*, p. 43.

(*p*) Du Cange, Gloss. sub verb. Socagium, Soccus, 2; Litt. s. 119.

(*q*) Bract. 77 b.

(*r*) Thus a sokeman might have to plough for his lord three times a year and do a few days' extra work at harvest time, where a villein would have to work three days a week for his lord. See Domesday, i. 179 a (services of householder in Hereford); Liber Niger Petroburgensis (circa A. D. 1125) published as an appendix to the Chronicon Petroburgense (Camden Society), pp. 157—166, 172, 173, where compare the services of the *sochemanni* with those of the *villani*; Glanv. vii. 1, 3, 9, 11; Bract. fo. 35 b, 77 b, 85 b, 207 a, 209 a; Britt. liv. 3, ch. 2, §§ 5, 7; Rot. Hund. ii. 470, 475, 484, 501, 591, 608, 656, 677, 752, 846, 871; Vinogradoff, Vill in Eng. 196 *sq.*, 308 *sq.*

(*s*) Litt. s. 119.

(*t*) See Nasse, Agricultural Community of the Middle Ages (English translation), 32—36; Seebohm, English Village Community, 86 and note.

as well as of the original class of free sokemen (*u*). So that by the time of Edward I., the free tenants of a manor, holding their land in socage, often at a money rent, had become prominent members of the agricultural community (*x*); whilst the *villani* of that period, of whose tenure the servile conditions are often especially noted in records, occupied an inferior position (*y*). Besides the services incident to tenure in free socage, the tenant was bound to take an oath of fealty to his lord; sometimes, indeed, he owed no other service than fealty (*z*): but homage, the invariable incident of military tenure, was rarely required of him (*a*). The statutory aids *pour fille marier* and *pour faire fils chevalier* were incumbent on tenants in socage as well as by knight's service (*b*). In all cases of annual rent, the relief paid on succession by the heir of tenant in socage was fixed at one year's rent (*c*). Suit of court and escheat were incident to socage as to military tenure (*d*). The main difference between the two forms of tenure was in the matters of wardship and marriage, which, in the case of an infant heir of a tenant in socage, devolved, not upon his lord, but on his nearest relation to whom the inheritance could not descend; and by a Statute of Henry III., the guardian in socage was made accountable to the heir for the profits of the land, and prohibited from selling the marriage, save to the heir's advantage (*d*).

Incidents of socage.

Fealty.

Aids.

Relief.

Wardship and marriage in socage.

(*u*) Bract. fo. 37 a, 77 a, 207 a; Vinogradoff. Vill. in Eng. 196; P. & M. Hist. Eng. Law, i. 273—275.

(*x*) As to the freeholding tenants of the manor of the thirteenth century, see Vinogradoff. Vill. in Eng., Essay I. ch. iii., Essay II. ch. iv., also pp. 308—312, 387 *sq.*, 406—408, 452.

(*y*) See Nasse, 34—40; Rot. Hund. ii. 321, 334, 338, 623.

(*z*) Bract. fo. 84 b; Litt. ss. 117, 118, 130, 131.

(*a*) Bract. fo. 77 b, 84 a: see Vinogradoff. Vill. in Eng. 454.

(*b*) *Ante*, p. 47, n. (*p*).

(*c*) Glanv. ix. 4; Bract. fo. 85 b, 86 a; Litt. ss. 126—128.

(*d*) Glanv. vii. 11; Bract. fo. 87 b, 91 a; Fleta. fo. 5; Britton. liv. 3, ch. 2, § 5; Litt. ss. 123—125; stat. of Marlborough, 52 Hen. III. c. 17: see P. & M. Hist. Eng. Law, i. 302, 303, ii. 442.

As time went on, the term socage was applied as a general name to all tenures, where the tenant held of his lord by certain service for all manner of services, so that the service were not knight's service (*e*). Socage tenure thus came to comprise several forms of tenure in which the services were not originally of the nature of sokeman-service, but which were distinguished by certainty of service and freedom from the lord's right of wardship and marriage; as in the case of those whose tenure had by agreement with their lords been changed out of knight's service to certain rent (*f*), or of those who held by petty serjeanty (*g*). Originally, to hold by petty serjeanty seems to have been to hold lands, whether of the king or of some other lord, either by some royal service of small value, as finding the king a man and horse with bag and buckle for any necessity touching his army, or else by some petty service to be rendered to the tenant's immediate lord, as riding with him, holding his courts, carrying his writs within certain bounds, feeding his hounds, or finding him bows and arrows (*h*). But in Littleton's time tenure by petty serjeanty seems only to have survived in cases where a man held lands of the king by yielding him yearly a bow, or a sword, or a pair of gilt spurs, or other such small things belonging to war (*i*). So, too, tenure in burgage (*k*) was said to be but tenure in socage (*l*). Thus tenure in socage, though of humbler origin than the military tenures, came to be regarded as a far more beneficial form of landowning.

Petty serjeanty.

(*e*) Bract. fo. 37 a, Fleta. fo. 199; Litt. ss. 117, 119; Vinogradoff, Vill. in Eng. 196; P. & M. Hist. Eng. Law, i. 271—275.

(*f*) See Bract. fo. 86 a, 87 b; Britton. liv. 3, ch. 2, §§ 5. 8. It is thought, too, that many tenures which were originally by scutage (*ante*, p. 46), came afterwards to be regarded as socage, through the decay of scutage; P. & M. Hist. Eng. Law, ii. 267.

(*g*) Fleta. fo. 204.

(*h*) Bract. fo. 35 b, 87 b; Fleta, fo. 5; see Britt. liv. 3. ch. 2, § 6, and note thereto, ed. Nichols; Vinogradoff, Vill. in Eng. Essay II. ch. iv.; P. & M. Hist. Eng. Law, i. 262 *sq.*

(*i*) Litt. ss. 159, 161; Co. Litt. 108 a.

(*k*) *Ante*, p. 43.

(*l*) Litt. s. 162.

Tenure in frankalmoign arose before the statutes of Edward I. prohibiting the alienation of land into mortmain (*m*), when a man gave land to an abbot or prior and his convent, or to a dean and chapter, or other ecclesiastical corporation to be held by them and their successors in pure and perpetual alms or in *frankalmoign* (*n*). And they who held in frankalmoign were bound of right (*o*) before God to make prayers and other Divine services for the souls of their grantor and his heirs. And they did neither homage, nor fealty, nor any other service to their lord: because their Divine service was reckoned better for the lord than any doing of fealty; and because the words *in frankalmoign* excluded the lord from having any earthly or temporal service done for him (*p*). As a corporation never dies, no relief could become payable, and there was no chance of escheat (*q*).

Tenure in frankalmoign.

Mortmain.

Section III.

Of Free Tenure in Modern Times.

As time went on, many of the incidents, both of military and other tenures, ceased to have any practical importance. Scutage became obsolete, as we have seen (*r*); and the military service, which it had

(*m*) Stats. 7 Edw. I. c. 1; 18 Edw. I. c. 1; from which it appears that lands given to an ecclesiastical or other corporation were said to come into the *dead hand*, because they then become unprofitable, both to the king, because the exaction of the royal services due to him therefrom was prejudiced, and also to the immediate lords, who lost all prospect of reliefs, wardships, marriages or escheats out of them.

(*n*) As to *frankalmoign* in the twelfth and thirteenth centuries, see Maitland, L. Q. R. vii. 354; P. & M. Hist. Eng. Law, i. 218 *sq.*

(*o*) *I.e.*, by ecclesiastical law, which provided a remedy for the lord if the tenants neglected their divine services; Litt. s. 136; Co. Litt. 95 b, 96 a.

(*p*) Glanv. vii. 1, ix. 2; Bract. fo. 13 a. 27 b. 78 b; Litt. ss. 133—142; Co. Litt. 67 b.

(*q*) Co. Litt. 94 b. 95 a, 99 a, 250 a.

(*r*) *Ante*, p. 47.

superseded, became a mere tradition (*s*). Homage and fealty were neglected (*t*), and the fixed money rents so often payable in respect of fees held in socage gradually fell into insignificance with the diminishing value of money. But the lord's rights of wardship and marriage in the case of tenure by knight's service and the peculiar exactions, to which the heirs of the king's tenants *in capite* were liable (*u*), continued to be actively enforced. Through Tudor legislation, the burthen of these liabilities was rendered more galling (*x*); and at the end of the sixteenth century they were felt to be an intolerable hardship (*y*). A resolution of the Long Parliament passed on the 24th of February, 1645, at length gave relief (*z*), which was too precious to be afterwards relinquished. Accordingly, at the restoration of King Charles II. an Act of Parliament was insisted on and obtained, providing that as from the 24th of February, 1645, all tenures by knight's service, and the fruits and consequences of tenures *in capite* (*a*) should be taken away, and all tenures of estates of inheritance in the hands of private persons (except tenures in frankalmoign and copyhold tenures) turned into free and common socage; and that the same should be for ever discharged from homage, wardships, values and forfeitures of marriage, and other charges incident to tenure by knight's service, and from aids for marrying the lord's daughter and for making his son a knight (*b*).

(*s*) See Litt. ss. 95—97, 100; P. & M. Hist. Eng. Law. i. 232.

(*t*) Co. Litt. 68 a.

(*u*) *Ante*, p. 48, n. (*y*).

(*x*) Stats. 4 Hen. VII. c. 17; 28 Hen. VIII. c. 10, deprived tenants of the opportunity, which they had previously enjoyed, of preventing the incidence of the lord's right of wardship by keeping their lands in the hands of a number of trustees for their own use. By stat. 32 Hen. VIII. c. 46, a Court of Wards and Liveries was erected, the proceedings of which caused much discontent.

(*y*) See Sir Thomas Smith, De Republica Anglorum, lib. 3, c. 5, ed. 1583; 4 Inst. 202.

(*z*) Digby, History of the Law of Real Property, ch. ix.

(*a*) Co. Litt. 108 a. n. (5).

(*b*) Stat. 12 Car. II. c. 24. The 12th Car. II. A.D. 1660, was the first year of his actual reign.

Since the year 1645, therefore, the only free tenures existing have been the lay tenure of free and common socage and the spiritual tenure of frankalmoign. In modern times the incidents, which mark the relation of lord and tenant of an estate in fee simple held in socage, are of rare occurrence. Thus a *rent* is not now often paid in respect of the tenure of an estate in fee simple. When it is paid, it is usually called *quit rent* (*c*), and is almost always of a very trifling amount; the change in the value of money in modern times will account for this. The *relief* of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is accordingly still due (*d*). Suit of Court also is still obligatory on tenants of estates in fee simple, held of any manor now existing (*e*). And the oath of fealty still continues an incident of tenure; but in practice it is never exacted (*f*). There is, however, one incident of tenure still remaining, which is occasionally productive of substantial advantage to the lord. The lands of a tenant in fee simple remain liable to escheat (*g*) to the lord of the fee on failure of the tenant's heirs. At the present day failure of heirs can only occur from natural causes, for an Act of the year 1870 abolished all attainder, forfeiture or escheat upon judgment for treason or felony (*h*). When,

Present free tenures.

Modern incidents of socage tenure.

Rent.

Relief.

Suit of Court.

Fealty.

Escheat.

(*c*) Which properly means a commutation rent, or rent whereby the tenant is quit of services; 2 Black. Comm. 43: Co. Litt. 85, a. n. (1); *Passingham*, app., *Petty*, resp., 17 C. B. 299: Williams on Seisin, 28. Such a rent may now be redeemed by the tenant under stat. 44 & 45 Vict. c. 41, s. 45; and the extinguishment of any manorial incident may be compelled by either lord or tenant under stat. 57 & 58 Vict. c. 46, s. 2.

(*d*) Co. Litt. 85 a, n. (1): Scriv. Cop. 738.

(*e*) Scriv. Cop. 736.

(*f*) Co. Litt. 67 b, n. (2), 68 b, n. (5).

(*g*) *Ante*, p. 48.

(*h*) Stat. 33 & 34 Vict. c. 23, s. 1 (passed 4th July, 1870). It had been previously provided that no attainder for felony, except in the case of high treason or murder, or abetting, procuring or counselling the same, should extend to the dis-

therefore, a tenant in fee simple dies, without having alienated his lands in his lifetime or by his will (either of which will prevent escheat) (*i*), and without leaving any blood relation to succeed him as his heir, such lands will fall in to the lord of whom they were held. Bastardy is the most usual cause of the failure of heirs; for a bastard is in law *nullius filius*; and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir of his body (*k*). If such a person, therefore, were to purchase lands, that is, to acquire an estate in fee simple in them, and were to die possessed of them without having made a will and without leaving any issue, the lands would escheat to the lord of the fee, for want of heirs. When an escheat occurs, the Crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the Crown is the lord paramount of all the lands in the kingdom (*l*). But if there should be any lord of a

Bastardy.

inheriting of any heir or the prejudice of the right of any person other than the right of the offender during life; stats. 54 Geo. III. c. 14; 9 Geo. IV. c. 31, s. 2; 24 & 25 Vict. c. 100, s. 8.

(*i*) Y. B. 49 Edw. III. 16, pl. 10; Co. Litt. 236 a, n. (1); Scriv. Cop. 762. But it may perhaps be doubted whether the present Wills Act (7 Will. IV. & 1 Vict. c. 26, s. 3) extends to this case, and whether, therefore, in order to prevent an escheat, three witnesses should not attest the will as under the old law, which still subsists as to wills to which the present Act does not extend (see sect. 2).

(*k*) Co. Litt. 3 b; 2 Black. Comm. 347; Bac. Abr. tit. Bastardy (B).

(*l*) It must not be supposed that the Queen personally derives any benefit from an escheat. The Crown rights over land have long been subject to parliamentary control and the revenues and profits arising therefrom applied to national purposes. The Crown lands are now managed by the Commissioners of Woods, Forests and Land Revenues, and the revenues thereof are during the Queen's life to be carried to the Consolidated Fund, which is applicable in generally defraying the national expenditure, and out of which the annual sum granted by Parliament for the Civil List (including Her Majesty's privy purse and the maintenance of her household) is paid. See 1 Black. Comm. 286, 331—335; stats. 56 Geo. III. c. 98; 10 Geo. IV. c. 50; 1 & 2 Vict. c. 2, ss. 2, 3. Procedure in cases of escheat is now regulated by stat. 50 & 51 Vict. c. 53, and the rules thereunder; see W. N. 27th July, 1889. Lands escheated or forfeited to the Crown have been

Crown rights over land.

manor or other person, who could prove that the estate so terminated was held of him, he, and not the Crown, would be entitled (*m*). In former times there were many such mesne or intermediate lords, as we have seen (*n*). But now the fruits and incidents of tenure of estate in fee simple are so few and rare, that many such estates are considered as held directly of the Crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact before-mentioned, that, since the statute of *Quia Emptores*, passed in the reign of Edward I. (*o*), it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seignory of an estate in fee simple bears date at least as far back as that reign: to this rule the few seignories which may have been subsequently created by the king's tenants *in capite* form the only exception (*p*). The Land Transfer Act, 1897 (*q*), does not affect lands escheating to the Crown, so that they do not pass to the deceased tenant's administrator (*r*). They are, however, liable to his debts (*s*). But where the lord of the fee is not the Crown, it appears that lands escheating to him now devolve in the first instance on the deceased tenant's administrator, or, if he should have left a will of personal estate, in the executors of that will; but, subject to the satisfaction of the tenant's debts and administration expenses, his lord retains his title to have the

frequently restored to the families of the persons to whom such lands belonged pursuant to stat. 39 & 40 Geo. III. c. 88, s. 12, explained and amended by stats. 47 Geo. III. sess. 2, c. 24; 59 Geo. III. c. 94, and 47 & 48 Vict. c. 71, and extended to forfeited leaseholds by stat. 6 Geo. IV. c. 17.

(*m*) *Doe* d. *Hayne and His Majesty* v. *Redfern*, 12 East, 96.

(*n*) *Ante*, pp. 38, 45.

(*o*) 18 Edw. I. c. 1; *ante*, p. 39.

(*p*) Lands vested in any person upon any trust, or by way of mortgage, were exempted from escheat by stats. 4 & 5 Will. IV. c. 23, and 13 & 14 Vict. c. 60, now replaced by 56 & 57 Vict. c. 53, ss. 26, 29.

(*q*) Stat. 60 & 61 Vict. c. 65, Part I., *ante*, p. 29.

(*r*) *Re Hartley*, 1899, P. 40.

(*s*) *Evans* v. *Brown*, 5 Jur. 116; *Hughes* v. *Wells*, 9 Hare, 749; *Beale* v. *Symonds*, 16 Beav. 406.

lands, and may require them to be conveyed to him in the same manner as an heir or devisee may (*t*).

A small occasional *quit rent*, with its accompanying *relief*,—*suit* of the *Court* Baron, if any such exists,—an oath of *fealty* never exacted,—and a right of *escheat* seldom accruing,—are now, it appears, therefore, the ordinary incidents of modern socage tenure. There are, however, a few varieties in this tenure which are worth mentioning. They arise in respect either of the terms on which the lands holden were originally granted, or the places where they are situate. As to the former case, lands may still be holden by grant or petty serjeanty (*u*); for while by the Act of Charles II. grand serjeanty was, with the other military tenures, turned into socage and deprived of its burdensome incidents, its honorary services were expressly retained (*x*). And petty serjeanty, being but socage in effect, was not abolished by the statute (*y*). With regard to such varieties of tenure as relate to places, these are principally the tenures of gavelkind, borough-English, and ancient demesne.

Gavelkind.

The tenure of gavelkind, or as it has been more correctly styled (*z*), socage tenure, subject to the custom of gavelkind, prevails chiefly in the county of Kent; where all lands anciently and originally holden in socage are of the nature of gavelkind (*a*), and all estates of inheritance in land (*b*) are presumed to be holden by this tenure until the contrary is shown (*c*). The most remarkable feature of this kind of tenure is that upon the death of a tenant in fee intestate, the

(*t*) *Ante*, p. 29.
(*u*) *Ante*, pp. 49, 52.
(*x*) Stat. 12 Car. II. c. 24, s. 7: Co. Litt. 108 a, n. (1).
(*y*) Litt. s. 160; Co. Litt. 108 b, n. (1).
(*z*) Third Report of Real Property Commissioners, p. 7.
(*a*) Rob. Gav. 45 (55, 3rd ed.).
(*b*) Including estates tail, Litt. s. 265; Rob. Gav. 52, 94 (64, 119, 3rd ed.).
(*c*) Rob. Gav. 44 (54, 3rd ed.).

descent of his estate is not governed by the common law rule, which, as we shall see (*d*), gives the land to the eldest son or other male relation to the exclusion of all other males in the same degree of kindred: but his land goes to all his sons in equal shares (*e*), and so to brothers and other collateral relations, on failure of nearer heirs (*f*). It is also a remarkable peculiarity of this custom that, although by the common law no one under the age of twenty-one years can make a binding disposition of his land (*g*), a tenant in fee of gavelkind lands is able, at the early age of fifteen years, to dispose of his estate by feoffment (*h*) the ancient mode of conveyance already alluded to (*i*). There was also no escheat of gavelkind lands upon judgment of death (*k*) for felony (*l*); and some other peculiarities of less importance belong to this tenure (*m*). The custom of gavelkind is undoubtedly of great antiquity (*n*), and its existence seems to be owing to the preservation in Kent of old English law with regard to lands holden by paying *gafol* or rent (*o*). It is still held in high esteem by the inhabitants, so that whilst some lands

(*d*) *Post*, ch. ix.

(*e*) Litt. s. 210. 265.

(*f*) Rob. Gav. 92 (115, 3rd ed.); 3rd Rep. of Real Prop. Commrs. p. 9; *Crump* d. *Woolley* v. *Norwood*, 7 Taunt. 362: *Hook* v. *Hook*, 1 H. & M. 43; in opposition to Bac. Abr. Descent (D), citing Co. Litt. 140 a.

(*g*) *Post*, ch. xii.

(*h*) Rob. Gav. 193, 194, 217, 218 (248, 249, 276, 279, 3rd ed.); 2 Black. Comm. 84; Sandys, Consuetudines Kanciæ, 165 *sq.*; see stat. 8 & 9 Vict. c. 106, s. 3.

(*i*) *Ante*, p. 31.

(*k*) Otherwise in case of outlawry for felony or abjuration of the realm; see *ante*, p. 48.

(*l*) Rob. Gav. 226 (288 *sq.*, 3rd ed.). The custom did not extend to give exemption from forfeiture on high treason.

(*m*) The husband is tenant by the curtesy of a moiety only of his deceased wife's land, until he marries again, whether there were issue born alive or not: the widow also is dowable of a moiety instead of a third and during widowhood and chastity only: estates in fee simple were devisable by will, before the statute was passed empowering the devise of such estates; and some other ancient privileges, now obsolete, were attached to this tenure. See Rob. Gav. *passim*; 3rd Rep. of Real Prop. Commrs. p. 9.

(*n*) See Bracton's Note-book, cases, 9, 666, 1644, 1769; Consuetudines Kanciæ, 1 Statutes of the Realm, 223.

(*o*) Somner on Gavelkind, 61 *sq.*, 2nd ed.; Rob. Gav. 20—31 (24—38, 3rd ed.); Elton, Tenures of Kent, 50—53; Vino-

in the county, having been originally held by knights' service, are not within the custom (*p*), and others have been disgavelled, or freed from the custom, by various Acts of Parliament (*q*), any attempt entirely to extinguish the peculiarities of this tenure has uniformly been resisted (*r*). There are a few places, in other parts of the kingdom, where the course of descent follows the custom of gavelkind (*s*); but it may be doubted whether the tenure of gavelkind, with all its accompanying peculiarities, is to be found elsewhere than in the county of Kent (*t*).

Borough-English.

Tenure subject to the custom of borough-English owes its origin to the old law of tenure in burgage (*u*). It prevails in several cities and ancient boroughs, and districts adjoining to them; the tenure is socage, but, according to the custom, the estate descends to the *youngest son* in exclusion of all the other children (*x*). The custom does not in general extend to collateral relations; but by special custom it may, so as to admit the youngest *brother*, instead of the eldest (*y*).

Ancient demesne.

The tenure of ancient demesne exists in those manors, and in those only, which were in the demesne (*z*) of the Crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis Edwardi*, or *Terræ Regis* (*a*).

gradoff, Villenage in England, 205 *sq.*, 247; P. & M. Hist. Eng. Law. i. 165, ii. 269.

(*p*) Rob. Gav. 46 (57, 3rd ed.).

(*q*) See Rob. Gav. 75 (94, 3rd ed.).

(*r*) An express saving of the custom of gavelkind is inserted in the Copyhold Act, 1894, stat. 57 & 58 Vict. c. 46, s. 95, replacing 4 & 5 Vict. c. 35, s. 80.

(*s*) Kitchen on Courts, 200; Co. Litt. 140 a.

(*t*) See Bac. Abr. tit. Gavelkind (B) 3.

(*u*) *Ante*, p. 43; see Vinogradoff, Vill. in Eng. 185; P. & M. Hist. Eng. Law. i. 641, 642, ii. 277.

(*x*) Litt. s. 165; 2 Black. Comm. 83. Estates tail, as well as in fee simple, descend according to this custom; Rob. Gav. 24 (120, 3rd ed.).

(*y*) Com. Dig. Borough-English; Watk. Descents, 89 (94, 4th ed.). See *Rider* v. *Wood*, 1 K. & J. 644.

(*z*) That is, manors, of which the lordship had not been granted out by the Crown: and in which the tenants held directly of the Crown as lord of the manor.

(*a*) 2 Scriv. Cop. 687.

The socage tenants of these manors possessed certain immunities, the chief of which was that all actions concerning the title to their land must be brought in their lord's court (*b*). Before the year 1833, certain judicial proceedings in the form of real actions (*c*) were necessary to effect the conveyance of land in particular cases; and these proceedings could only take place, as to lands in ancient demesne, in the lord's court. As the nature of the tenure was not always known, much inconvenience frequently arose from the proceedings being taken in the usual Court of Common Pleas at Westminster, and these mistakes gave to the tenure a prominence in practice which it would not otherwise have possessed. In consequence of the substitution in the year 1833 of a simple deed for the judicial proceedings referred to, such mistakes have since been impossible (*d*). And owing to changes of procedure made in the year 1852 (*e*), actions for the recovery of land held in ancient demesne may now be brought in the ordinary courts of law without the possibility, which previously existed (*f*), of the defendants objecting to the tribunal (*g*). So that this kind of socage tenure now possesses but little practical importance.

(*b*) These socage tenants holding in ancient demesne appear to have been the successors of the *villani sochemanni*, a privileged class of tenants in villenage on the ancient demesne of the Crown, whose possession was protected not in the King's Court, but by a special writ issued by the king and directed to his bailiff of the manor. See Bract. fo. 7, 26, 200, 328 b; Fleta, fo. 4; Britt. liv. 3, ch. 2, § 11; F. N. B. 11 F. M., 12 B, 13 D, 14; 4 Inst. 269; Com. Dig. Ancient Demesne; 2 Black. Comm. 99; 3rd Rep. of Real Prop. Commrs. p. 12; Vinogradoff. Vill. in Eng., Essay I. ch. iii.; P. & M. Hist. Eng. Law, i. 366 *sq.*; Maitland, Domesday Book and Beyond, 65.

(*c*) These were *fines*, necessary to convey the estates of married women, and *recoveries* used to bar estates tail; see *post*, ch. iii. and viii.

(*d*) By stat. 3 & 4 Will. IV. c. 74 (the Act for the Abolition of Fines and Recoveries), ss. 4—6, the mistakes above alluded to were corrected as far as possible.

(*e*) By stat. 15 & 16 Vict. c. 76, ss. 168 *sq.*

(*f*) Adams on Ejectment, 229, 4th ed.

(*g*) See Cole on Ejectment, 132, 133.

So much then for the lay tenure of free and common socage, with its incidents and varieties. As we have seen (*h*), the spiritual tenure of frankalmoign was expressly excepted from the statute 12 Car. II. c. 24, by which the other ancient tenures were destroyed. It is still subsisting, distinguished in modern as in ancient times by its immunity from temporal services, even from the obligation to do fealty (*i*), and is the tenure by which the lands of the church are for the most part held (*k*).

Frankalmoign.

In connection with the progress from ancient to modern tenure and ownership, we may here notice, besides the diminution of the lord's interest, another change, which has also greatly helped to bring about the approximation to absolute ownership of the right of a freeholder in fee. That is, the abolition of the common field system of cultivation. This was generally effected all over England by private Acts of Parliament, passed chiefly between 1760 and 1845 (*l*), for the inclosure of the common fields or particular manors and villages. By these Acts the common lands were set out or redistributed so as to allot to the various landowners separate holdings lying more or less together, in place of and proportionate in size to their former scattered strips (*m*). The consequence of this was an enormous gain in the direction of free enjoyment (*n*). Strips of land in a common field were subject to the customary mode of cultivation prevailing in the village community, and to the common rights of pasture, when lying fallow (*o*). But the inclosure of common lands gave to each landowner a holding, which he might cultivate as he would, and which was discharged from his neighbours' rights of common.

Inclosure of common lands.

(*h*) *Ante*, p. 54.
(*i*) See *ante*, p. 53.
(*k*) 3rd Report of Real Property Commissioners, p. 7.
(*l*) Seebohm, Eng. Vill. Comm. 14, 15.
(*m*) See Williamson Commons, 77—79, 246 *sq.*; Seebohm, Eng. Vill. Comm. 13, 14; Scrutton, Commons and Common Fields, ch. vi. vii.
(*n*) *Ante*, p. 2.
(*o*) Seebohm, Eng. Vill. Comm. 11, 12, 450; Vinogradoff, Vill. in Eng. 230, 259 *sq.*, 398—400; see *ante*, p. 41.

CHAPTER II.

OF AN ESTATE IN FEE SIMPLE.

In the preceding chapter we examined the tenure of a freehold in fee, and found that in modern times the incidents, which mark the relation of lord and free tenant of a fee, rarely occur in practice, and are an insignificant burden on the tenant and of small profit to the lord. For the latter now has no possibility of deriving any substantial benefit from his position except in the case of escheat, and this can only happen when the tenant dies intestate and without heirs. We will now consider the incidents of freehold estates generally, and the tenant's rights and liabilities in respect of his land as regards all other persons besides his lord. And first, estates (*a*) in land are either freehold or less than freehold. Freehold estates are either estates of inheritance, which are in fee simple (inheritable by heirs generally), or in fee tail (inheritable only by heirs of the donor's body), or else estates not of inheritance, but for some definite period of uncertain duration, as where land is given to one to hold for his life, or the life of another, or until some particular event shall happen. Estates less than freehold arise where one gives land to another to hold for a certain period or *term*, or at the donor's will only, or where one occupies another's land on sufferance (*b*). That a tenant who may be ejected at will should not have a freehold is hardly surprising, but the reader may wonder why the modern leaseholder, whose

Estates of freehold or less than freehold.

(*a*) See *ante*, pp. 7, 8.
(*b*) Bract. fo. 26 b, 27 a, 207 a; Litt. s. 57; Co. Litt. 43 b; 2 Black. Comm. ch. vii.—ix.

possession is in every way secure, and who frequently holds for a term exceeding the ordinary duration of human life, should not have an estate of freehold. The reason is that the old law would never recognize the possession of termors as the possession of a freeholding, or allow them to use the freeholder's remedies for dispossession. And though leasehold interests in land afterwards came to be an important species of property in land, yet they were protected by special remedies, and so came to be classed apart from freeholds (*e*).

Freeholders' right to maintain or recover possession.

Let us here notice that the essential quality of ownership belongs equally to all freehold estates. For every freeholder, whether in fee simple, fee tail, for life or otherwise, has the right to maintain or recover possession of his land as against all the world (*d*). While he remains in possession he may exclude all others from his land (*e*); and if he be wrongfully ejected, he may recover possession of his land by peaceable (*f*) entry or by action (*g*). And these rights have been secured to freeholders from the earliest days of our common law (*h*).

(*c*) See *ante*, p. 18.

(*d*) *Ante*, pp. 2, 17.

(*e*) 3 Black. Comm. ch. xii.; Bac. Abr. Trespass (C. F.)

(*f*) Forcible entry is prohibited by stats. 5 Ric. II. st. 1, c. 7 (c. 8 in Ruffhead); 15 Ric. II. c. 2; see *Beddall* v. *Maitland*, 17 Ch. D. 174.

Action of ejectment.

Action for the recovery of land.

(*g*) The real and mixed actions given by the common law to freeholders were abolished in 1833. But for more than two centuries previously it had been usual to try the title to freehold land in the action of ejectment. This was properly the leaseholder's remedy for dispossession: but it was extended to freeholds by means of the fiction of a lease, which the defendant was by rule of Court prevented from disputing. In 1852 the old proceedings in ejectment, including the fiction of a lease, were abolished, and a simpler form of action was substituted, enabling any person, whether freeholder, copyholder, or leaseholder, to recover directly the possession of land, if entitled thereto. Since the Judicature Acts began in 1875, this action has been termed an action for the recovery of land. See *ante*, pp. 17, 18, 24; 3 Black. Comm. 200—206; stats. 3 & 4 Will. IV. c. 27, s. 36; 15 & 16 Vict. c. 76, ss. 168—221; R. S. C. 1883, Orders III. (r. 6), XII. (rr. 25—29), XVIII. (r. 2), XXI. (r. 21), XLII. (r. 5), XLVII., and Appx. A. pt. III., s. 4, C. s. 7, H. No. 8.

(*h*) See *ante*, pp. 17, 18.

Estate in fee simple.

Of freehold estates, let us first take an estate in fee simple; that is, an estate given to a man and his heirs simply and without restriction (*i*), and inheritable therefore by his blood-relations, collateral as well as lineal, according to the legal rules of the descent of a fee (*k*). Such an estate is, as we have seen (*l*), the most absolute property which a subject can have in land. It possesses, indeed, all the incidents of absolute ownership, except the form (*m*). For tenant in fee simple may freely dispose of his land in his lifetime or by his will, and that either for his whole estate or for any part thereof, as for a term of years. His land may be taken to satisfy his debts either in his lifetime or after his death. And he has the right of *free* enjoyment (*n*) to the fullest extent which is consistent with the security of his neighbours' persons and property. It must not be supposed, however, that all these advantages have always been attached to the possession of fee. On the contrary they were won step by step, and at widely different periods. It is a constant disadvantage to anyone attempting to expound real property law, that so many matters, apparently simple, cannot be rightly explained without referring to the history of law and to times long gone by. But for this very reason, real property law affords a peculiarly instructive exercise for the student. From no other branch of the law is he likely to gain such a thorough conviction of the futility of attempting to reason about law upon instinct, without knowing how the law became what it is.

Fee simple tenant's right of alienation in his lifetime.

Let us examine first the fee-simple tenant's right of alienation in his lifetime (*o*). It appears from Domesday that before the Norman Conquest there were

(*i*) Bract. fo. 17 a; Litt. s. 1.
(*k*) These are given in ch. ix., *post*.
(*l*) *Ante*, p. 6.
(*m*) See *ante*, pp. 2, 3.
(*n*) *Ante*, p. 2.
(*o*) As to this, see P. & M. Hist. Eng. Law, i. 310 *sq.*

certainly some free landowners who could dispose of their land as they would (*p*). But the system of feudal tenure, which came to be the general condition of holding land freely after the Conquest, was essentially restrictive of alienation. For the grant of a fee to a man and his heirs was not originally construed as conferring upon the grantee the whole property in the land bestowed. On the contrary, he was regarded rather as taking only a right to enjoy the land himself so long as he lived; while his heir, who was by the grantor's bounty appointed to succeed to a similar right, was considered as acquiring thereby a substantial interest in the land (*q*). The lord himself, too, retained valuable rights over the land; for the services reserved on the grant of a fee were a charge upon the land, and if they fell into arrear, he had the remedy of distress by seizing the tenant's chattels, which were upon the land (*r*). The lord also had, as we have seen (*s*), the right to repossess the land, as his escheat, on failure of the tenant's heirs. In subinfeudation, or the grant of a fee to be held of himself (*t*), the tenant found means of disposing of his land without actually breaking the feudal tie between his lord and himself; but it seems that at first he could not, even by subinfeudation,

Distress.

(*p*) Those, of whom it is recorded that they could give or sell their lands without their lord's licence, or as they would, or could go where they would with their land; see, for example, Domesday, 30 b, 31, 34, 127, 130, 210; Maitland, Domesday Book and Beyond, 46—50, 67 *sq.* It is worthy of note that in places where the old English customs were best preserved we find customs alleged for freemen to sell their lands as they will; see customs of Newcastle-on-Tyne, Stubbs, Select Charters, 112, 2nd ed.; Consuetudines Kanciæ, 1 Statutes of the Realm, 223.

(*q*) Butler's note (vi. 5) to Co. Litt. 191 a; Hallam. Middle Ages, i. 159—183; Palgrave, English Commonwealth, vol. i. pp. 509 *sq.*; vol. ii. pp. ccxci. *sq.*: Glanv. vii. 1; Stubbs, Const. Hist. §§ 93—96; and see P. & M. Hist. Eng. Law, i. 295 — 297, 320 *sq.*, ii. 306 *sq.*

(*r*) Glanv. ix. 8; Bract. fo. 156 a, 217; Britt. liv. 1, ch. 28, §§ 13—15; liv. 3, ch. 4, §§ 16, 23; P. & M. Hist. Eng. Law. i. 215—217, 334; ii. 573.

(*s*) *Ante*, p. 48.

(*t*) *Ante*, p. 38.

give his grantee a valid title to the land without the confirmation both of his heir and of his lord (*u*). But as a general English law of tenures grew up under the influence of regular decisions of the king's court, these restrictions on alienation were gradually relaxed.

Progress of right of alienation as against heir.

Inroad was first made upon the interest of the heir. For we learn from Glanville (*x*) that in Henry the Second's reign any freeholder might give away *part* of his land at will, either with his daughter in marriage, or in remuneration of service, or to a religious place in alms (*y*); and his heirs were bound to warrant (*z*) gifts so reasonably made (*a*). At the same time a larger right of alienation was enjoyed over lands which a man had acquired by purchase than over those of which he had become possessed by inheritance; but even in the case of purchased lands a tenant in fee could not by alienation entirely disinherit an heir sprung of his own body, though he might defeat the expectation of his collateral heirs (*b*). The allowing of such gifts as the above forms an important step in the progress of the right of alienation. For, when lands were given to a daughter on her marriage, the daughter and her husband, or the donees in *frank-marriage*, as they are called, held the lands granted to them and the heirs of their two bodies *free from all manner of service* to the donor or his heirs (an oath of fealty (*c*) excepted), until the

Frank-marriage.

(*u*) This may be inferred from the existence of numerous early charters of confirmation both by heir and lord. The heir, however, usually confirms after the grantor's death on his succession to the lordship created by the subinfeudation: and such a confirmation may be no more than a formal acknowledgment of the feudal tie. Doubtless in many cases the object of getting the heir's confirmation was to make valid a gift of land made by the ancestor without delivery of possession. See Mad. Form. Ang., Nos. 69—120, 285, 293, 295, 316, 319, 415, 419, 460, 464, 512, 525, 547; Cartulary of the Abbey of Ramsey, Rolls ed. i. 135, 139, 147, 154, 159; Glanv. vii. 1; Bract. fo. 389 a; P. & M. Hist. Eng. Law, i. 321—324, ii. 307 *sq.*, 324—328.

(*x*) Lib. vii. c. 1.

(*u*) See *ante*, pp. 14, 38, 39, 53.

(*z*) See *ante*, p. 38.

(*a*) Glanv. vii. 2.

(*b*) Glanv. vii. 1.

(*c*) *Ante*, pp. 47, 51.

fourth degree of consanguinity from the donor was passed (*d*); and the grantors of lands in frankalmoign were, as we have seen (*e*), for ever free from every kind of temporal service. So that in these cases little or nothing remained for the heir of the grantor. Nor was the heir always much better off if his ancestor granted part of his land in return for services. For though the services reserved on the grant might in some cases be a fair equivalent for the gift of the land, in others the main consideration for the gift was the payment of a sum of ready money to the grantor as a fine, and the services reserved were of little or no value, and only intended to preserve an acknowledgment of the tenure (*f*). The current of decision, however, had set in favour of the right of alienation; and in Henry the Third's reign, the son wholly disinherited by his father's alienation was denied any remedy at law (*g*). Bracton, writing in the same reign, lays down (*h*) that, in the case of a gift of land to a man and his heirs, the donee acquires the land by *gift*, and his heir after him takes it by *succession*; but acquires nothing therein by the gift made to his ancestor. In other words, on the grant of a fee simple, the heir takes nothing by *purchase* (*i*), a term extended to any cause of acquisition of land by a man's own agreement and not by descent (*k*); he obtains only the expectation of inheritance, and has no estate or interest in the land (*l*). And this remains law to this day. So

Purchase.

Heir's expectancy.

(*d*) Glanv. vii. 18; Bract. fo. 21; Litt. ss. 17, 19, 20.

(*e*) *Ante*, p. 53.

(*f*) See Madox, Form. Angl., Nos. 299, 300, 302—305, 311, 312, 313, 317, 320—323, 326, 327, 329, 330, 331, 460, 468, 472, 473, 509, 518; Rot. Hund. ii. 361—390, as to the tenure of and title to houses in Cambridge.

(*g*) Bracton's Note Book, case 1054.

(*h*) Fo. 17 a.

(*i*) Fleta, fo. 185; Britton, liv. 2, ch. 5, § 1.

(*k*) Litt. s. 12; Co. Litt. 18 b.

(*l*) Litt. s. 446. An heir's expectancy is but a *bare possibility* not assignable at law: Ld. Kenyon, C.J., *Jones* v. *Roe*, 3 T. R. 88, 93; *Carleton* v. *Leighton*, 3 Mer. 667; *Allcard* v. *Walker*, (1896) 2 Ch. 369. But it seems that an heir may make a contract dealing with his expectancy, and may be compelled to perform it specifically in equity; *Hobson* v. *Trevor*, 2 P. W. 191; *Wethered* v. *Wethered*, 2 Sim. 183; *Re Clarke*, 35 Ch. D. 109, 36 Ch. D. 348;

that ever since Bracton's time, a gift to a man and his heirs generally has enabled the grantee either entirely to defeat the expectation of his heir by an absolute conveyance in his lifetime, or to prejudice his heir's enjoyment of the descended lands, by obliging him to satisfy any debts or demands to the value of the lands according to the ancestor's discretion. For the very circumstance that the land was given to him and his heirs has enabled him to convey an interest in the land to last as long as his heirs continue to exist.

Progress of right of alienation as against lord.

The interest of the lord in the land held by his tenant in fee was, it will be remembered, of two kinds; his right to the services reserved to him, and his chance of escheat. Subinfeudation by his tenant could not deprive him of his right to the services, which remained a charge upon the land into whosesoever hands it might come (*m*). But the enforcement of such services was rendered more difficult by the division of the lands into various ownerships (*n*). Accordingly we find it enacted in Magna Charta (*o*) that no free man should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to his lord. Subinfeudation, too, deprived the lord of some of the most valuable fruits of tenure; for the wardship and marriage (*p*) of infant heirs belonged to the lords of whom they immediately held their lands. But in spite of these consequences legal opinion pronounced in favour of the right of alienation. Bracton strenuously maintains that a donee of land may alien over without doing wrong to his lord, and any consequent loss of services by the latter is but *damnum sine injuria* (*q*). He also

Tailby v. *Official Receiver*, 13 App. Ca. 523, 529—531, 543.

(*m*) Bract. fo. 263 b; Co. Litt. 43 a; P. & M. Hist. Eng. Law, i. 215—217.

(*n*) See Bract. fo. 156 a, 217 a.

(*o*) 2nd Charter of Henry III. c. 39; see Bracton's Note Book, case 1248; P. & M. Hist. Eng. Law, i. 313.

(*p*) *Ante*, p. 47.

(*q*) Bract. fo. 45 b, 46 a, 263 b. I think it is evident that Bracton is here demolishing a contrary opinion. This supports the inference that the lord's consent

lays down (*r*) that a tenant may absolve himself from his feudal obligation to his lord by disposing of his whole tenement to another in fee to hold of his lord, and that whether his lord will or no. The tenant could not, however, make a grant of part of his land to be holden of his lord without his lord's consent; for the services reserved on any grant were considered as entire and indivisible in their nature (*s*). Without his lord's consent the tenant could alien part of his land by subinfeudation only. The last step in the progress of alienation was the infringement of the lord's right of escheat. If a tenant in fee granted his land by way of subinfeudation to another and his heirs, the grantor's lord could have no chance of escheat, so long as the grantor had heirs to warrant his gift (*t*). But it appears that at first a tenant, who had no heirs, could not alien so as to bar his lord's claim to have the lands after his death as an escheat (*u*). As the advantages of a free power of disposition became apparent, a new form of grant was introduced with the object of bestowing the power of alienation, notwithstanding want of heirs of the donee. The lands were given, not merely to the tenant and his heirs, but to him and his heirs, *or to whomsoever he might wish to give or assign the land*, or with other words expressly conferring on the tenant the power of alienation (*x*). If the tenant under such a gift

had been previously considered necessary to enable the tenant to make a valid gift of his land (*ante*, p. 67); and so, I think, does the fact that, if a grant of land were made in fee with a prohibition of alienation, the prohibition was considered valid in Bracton's time: fo. 46, 47, 263 b; see P. & M. Hist. Eng. Law, i. 313, ii. 25, 26.

(*r*) Fo. 81 a.

(*s*) Co. Litt. 43 a: P. & M. Hist. Eng. Law, i. 314.

(*t*) Bract. fo. 37 b; Fleta, fo. 179; Britt. liv. 2. ch. 4. § 2.

(*u*) Bract. fo. 11 b, 12 b, 20 a, 29 b, 30 a, 92 b, 134 a, 381 b, 390 a, 412 b; Fleta, fo. 178, 189, 191; Britt. liv. 2. ch. 3. § 5. ch. 4, § 2, ch. 6. § 1. ch. 16, § 3: liv. 3, ch. 4, § 2.

(*x*) It appears that attempts, which nearly succeeded, were made to gain the power of alienation by will by taking grants to the grantee and his heirs or to whomsoever he might give or *devise* the land: Bract. fo. 49 a, 381 b, 412 b; P. & M. Hist. Eng. Law, ii. 14, 26.

assigned his land to another in fee, the latter and his heirs had the right to hold the land, on failure of the former's heirs, as tenants of the former's lord, who was by his original gift bound to warrant quiet possession to the *assigns* as well as the heirs of his donee (*y*). A power of alienation was thus bestowed, which postponed indefinitely the lord's right of escheat. And even when lands had been given to a tenant and his heirs only, his power of granting over the land, with full liberty of alienation for so long as his heirs should exist, made it increasingly difficult for his lord to secure the benefit of an escheat (*z*). In addition to this, it appears that early in the reign of Edward I. a further encroachment on the lord's interests was sanctioned by judicial opinion: for it seems then to have been considered that alienation in fee by a tenant holding to him and his heirs would deprive the lord of his escheat on failure of the tenant's heirs (*a*). The barons of the time of Edward I. accordingly, perceiving that, by the continual subinfeudations

(*y*) Bract. fo. 17 b, 20 a, 37 b, 381 b; Bracton's Note Book, case 1289; Fleta, fo. 197.

(*z*) It is probable that the practice of conveying lands by fine worked adversely to the lord's interests. A fine was an agreement of compromise made by leave of the Court between the parties originally to a genuine but afterwards to a fictitious action, whereby the lands in question were acknowledged to be the right of one of them; and it was enrolled among the records of the Court. A fine was so called because, having the effect of a judgment in a writ of right, the highest form of real action, it put an *end*, not only to the matter in dispute, but also to all claims to the land not made, when Bracton wrote, at the time of the fine, but in the reign of Edward I., within a year and a day afterwards. Parties having rights to land, of which they were not in possession, were thus liable to be barred of their rights by a fine *levied* (as it was said) by the tenant in possession, and non-claim on their part within due time unless they were under some disability. See Glanv. lib. viii.; Bract. fo. 435 b *sq.*; Fleta, fo. 443; stat. 18 Edw. I. st. 4; *Thomas of Weyland's case*, Rot. Parl. i. 66; Plowd. 357; 2 Black. Comm. 348 *sq.*; Cruise on Fines, ch. i. viii; Maitland, L. Q. R. vol. vi. p. 22; P. & M. Hist. Eng. Law, ii. 94 *sq.*

Fines.

Fine and non-claim.

(*a*) I think that this may be inferred from the preamble of stat. 18 Edw. I. c. 1, and from the doctrine which appears by the preamble of stat. 13 Edw. I. c. 1, to have been established as to the alienation of conditional fees: see next chapter; see also Mirror, Abuses of the Common Law, § 50, & ch. v. sect. 5. We may note that it was settled in Bracton's time that if a tenant's

of their tenants, their privileges as superior lords were being gradually taken away, were fain to assent to the compromise of the question of tenants' alienation contained in the before-mentioned statute of *Quia Emptores* (*b*). As we have seen, this statute recognized the right of every free tenant in fee simple to sell his land or part thereof at will; but prohibited the practice of subinfeudation by providing that, on the alienation of land to be held in fee simple, the alienee should hold the land of the same immediate lord and by the same services as the alienor held it before. The Act further provided that, on the alienation in fee simple of part of a tenement, the alienee should hold it of the alienor's lord immediately, and should be charged with an amount of service to him proportionate to the extent of his purchase. The statute of *Quia Emptores* is still in force. Its effect has been to secure to every tenant in fee the right to substitute another in his place, as to the whole or part of his land, to hold as long as the new tenant's heirs may last, independently of the existence of any heirs of the former tenant: and that whether the land were originally given to the former tenant and his heirs only, or to him, his heirs and assigns (*c*). This statute did not extend to those who held of the king as tenants *in capite*, who were kept in restraint for some time longer (*d*). Free liberty of alienation was, however, subsequently acquired by them (*e*); and the right of disposing of an estate in fee simple by act *inter vivos* is

heirs failed by his attainder for felony, his alienation in fee before committing the felony could not be avoided either by his lord or the king; Bract. fo. 23, 29 b, 30, 130 a: see also *Thomas of Weyland's case*, Rot. Parl. i. 66, P. & M. Hist. Eng. Law, ii. 14.

(*b*) 18 Edw. 1. c. 1; *ante*, p. 39. P. & M. Hist. Eng. Law, i. 318 & n. (2).

(*c*) Apparently the Act was not immediately understood to have this effect; see Fleta, fo. 189, 191; Britt. liv. 2. ch. 3. § 5, ch. 44. § 2. ch. 6. § 1. ch. 16, § 3; both of which treatises are of the time of Edw. I. and mention the statute. But eventually the law was so settled; see Litt. ss. 1, 465.

(*d*) As to this, see P. & M. Hist. Eng. Law, i. 316—320.

(*e*) See *ante*, pp. 39, n. (*u*), 48, n. (*y*).

now the undisputed privilege of every tenant of such an estate.

Partial alienation by tenant in fee.

As a tenant in fee simple may alienate his whole estate, so he may dispose of any part of it. Thus he may freely grant to others estates for life or in tail, grant leases of his lands for any number of years, and charge on them the payment of any sum of money by way of mortgage or otherwise; and every such partial alienation will hold good against his heir and his lord, as well as the grant of his whole estate. The nature of the interests so created will be explained in subsequent chapters.

Alienation by will.

The power of alienating lands by will was not generally obtained till a much later date than that of the statute of *Quia Emptores*. It has been mentioned that freeholds were not devisable by will at common law (*f*), in consequence of the rule laid down after the establishment of the law of feudal tenure, that delivery of possession in the tenant's lifetime was necessary to complete any gift of a free holding of land (*g*). In certain places, however, freehold lands were devisable by will by virtue of a special custom. Thus tenants in fee simple of gavelkind lands (*h*), and of lands held in burgage (*i*) in the City of London, and some other ancient cities and boroughs, enjoyed the privilege of devising their lands (*k*). In process of time a method of devising lands by will was covertly adopted by means of conveyances to other parties, *to such uses* as

(*f*) *Ante*, p. 19. It appears, however, that before the Norman Conquest it was lawful in England to dispose of lands by writing to take effect after death: see Kemble, Codex Diplomaticus, Introd. vol. i. pp. cviii.—cxii.: P. & M. Hist. Eng. Law. ii. 312 *sq.* And it is noteworthy that the places, where lands were devisable after the Conquest were precisely those which had been successful in maintaining their ancient customs.

(*g*) Glanv. vii. 1. 5; Bract. fo. 38 b. 39 b. 270 a.

(*h*) *Ante*, p. 59.

(*i*) *Ante*, p. 43.

(*k*) Bract. fo. 49 a, 272 a, 409 b. 410; Litt. ss. 167—169.

the person conveying should appoint by his will (*l*). This indirect mode of devising lands was intentionally restrained by the operation of a statute, passed in the reign of King Henry VIII. (*m*), known by the name of the Statute of Uses, to which we shall hereafter have occasion to make frequent reference. But only five years after the passing of this statute, lands were expressly rendered devisable by will. This great change in the law was effected by statutes of the 32nd and 34th of Henry VIII. (*n*), which empowered tenants in fee simple to devise all their lands holden in socage, but two-thirds only of those holden by knights' service. So that it was not until the year 1645, when all military tenures were turned into socage (*o*), that the right of devising freeholds by will became complete and universal. At present, every tenant in fee simple fully enjoys the right of alienating his lands by will under the Wills Act of 1837 (*p*). As we have seen (*q*), under the Land Transfer Act, 1897 (*r*), fee simple estates devised by will now vest in the testator's executors or administrator in the first instance, and may be sold by them or him to satisfy the testator's debts or testamentary or administration expenses; but subject to this, the devisee retains the beneficial interest therein, and may require the same to be conveyed to him.

Blackstone's explanation of an estate in fee simple is that a tenant in fee simple holds to him and his heirs for ever, generally, absolutely and simply, without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law (*s*). But

(*l*) Perk. ss. 528, 537.
(*m*) Stat. 27 Hen. VIII. c. 10.
(*n*) Stats. 32 Hen. VIII. c. 1, 34 & 35 Hen. VIII. c. 5; Co. Litt. 111 b, n. (1).
(*o*) *Ante*, p. 54.
(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.
(*q*) *Ante*, p. 29.
(*r*) Stat. 60 & 61 Vict. c. 65, Part I.
(*s*) 2 Black. Comm. 104. See, however, 3 Black. Comm. 224, where the correct account is given.

the idea of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in the Roman Jurisprudence. The heir is always appointed by the law, the maxim being *Solus Deus hæredem facere potest, non homo* (*t*); and all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his *heirs* but his *assigns*. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike *assigns* in law, claiming in opposition to, and in exclusion of the *heir* who would otherwise have become entitled (*u*).

The heir is appointed by law.

Assigns.

There are certain exceptions to the general power of disposition now incident to the ownership of lands. Some of these arise from the personal incapacity of the tenant, an instance of which has been noticed in the case of an infant, or person under the age of twenty-one years (*x*). As the incidents of every estate in land may be affected by the personal incapacity of the tenant, the modifications made thereby will be explained in a subsequent part of the book. In the meantime, all that is said respecting a tenant of land, whatever his estate, must be understood as applying to the ordinary Englishman of full age and sound mind. Other exceptions to the power of alienating land arise in respect of the objects for which the disposition is made. Thus the alienation of land to or for the benefit of a corporation (*y*) into mortmain (*z*), otherwise than under the authority of a royal licence or a statute, is a cause of forfeiture to the lord of the fee; or if he fail to enter within a year, to his superior lord: and

Exceptions to right of alienation.

Alienation into mortmain.

(*t*) 1 Reeve's Hist. Eng. Law, 105; Co. Litt. 191 a, n. (1), vi. 3.

(*u*) *Hogan* v. *Jackson*, Cowp. 305; Co. Litt. 191 a, n. (1), vi. 10.

(*x*) *Ante*, p. 59.

(*y*) A Corporation is an artificial person, enjoying by fiction of law the capacity of holding property, and immortal existence: see *post*, ch. xii.

(*z*) See *ante*, p. 53, n. (*m*).

in default of entry thereon by any mesne lord, to the Crown (*a*). The penalty of forfeiture was originally imposed on the alienation of land into mortmain in order to prevent the gift of land to religious houses, whereby the king and the other lords were deprived of the services and fruits of tenure (*b*). And it was formerly necessary, in order to convey land into mortmain without incurring forfeiture, to have the licence not only of the Crown but also of the lord of the fee and every other mesne lord (*c*). But in modern times the rights of mesne lords having become comparatively trifling (*d*), the licence of the Crown alone has been rendered by Parliament sufficient for the purpose (*e*). So that at the present day, if a corporation be authorized to hold lands by royal licence or by statute, it will be no cause of forfeiture to convey lands to it. Again, the alienation of lands for charitable purposes is placed under severe restrictions, which were first imposed by an Act of George II., commonly called the Mortmain Act (*f*), and now repealed and replaced by the Mortmain and Charitable Uses Act, 1888 (*g*). Under this Act, every assurance of any hereditaments, of any tenure (*h*), for any charitable uses, is void (*i*), unless made in accordance with the requirements of the Act (*k*).

Alienation of land for charitable purposes.

(*a*) Stat. 51 & 52 Vict. c. 42, s. 1, replacing 7 Edw. I. st. 2, & 15 Ric. II. c. 5. Any superior lord must enter within six months after his inferior's right of entry has expired.

(*b*) See *ante*, p. 53.

(*c*) 2 Black. Comm. 269; Shelford on Mortmain, 35.

(*d*) See *ante*, pp. 55, 57, 63.

(*e*) Stat. 51 & 52 Vict. c. 42, s. 2, replacing stat. 7 & 8 Will. III. c. 37.

(*f*) Stat. 9 Geo. II. c. 36.

(*g*) Stat. 51 & 52 Vict. c. 42; see s. 13 and schedule; see also stat. 26 & 27 Vict. c. 106.

(*h*) See stat. 54 & 55 Vict. c. 74, s. 3.

(*i*) See *Churcher* v. *Martin*, 42 Ch. D. 312, decided on the Act of George II.

(*k*) The assurance must be made (i.) by deed (ii.) executed before at least two witnesses, (iii.) twelve months at least before the assurer's death, and (iv.) enrolled in the central office of the Supreme Court within six months after execution; and (v.) must be made to take effect in possession immediately for the charitable use intended; and (vi.) must, as a rule, be without any provision for the benefit of the assurer or his successors. Condition (iii.) is not imposed on sales of land

These prohibited the gift by *will* to a charity of any interest in land. But now, by an amending Act of 1891 (*l*), land may be assured by will to or for the benefit of any charitable use; but in such case it is required to be sold, as a rule, within one year from the testator's death. There are, however, several charitable institutions and objects, in favour of which the restrictions laid on the gift of land in charity are relaxed (*m*).

Voluntary conveyances.

Under the statute of Elizabeth (*n*), in terms avoiding conveyances made *with intent to defraud* subsequent purchasers, it was held that *voluntary* conveyances of any estate in lands, tenements, or other hereditaments whatsoever, and conveyances of such estates made with any clause of revocation at the will of the grantor, were void as against subsequent purchasers for money or other

to a charity for full value. Assurances of personal estate to be laid out in the purchase of land for a charity are subject to similar restrictions: but now, if personalty be directed to be so laid out by *will*, it shall be held for the benefit of the charity as though there had been no direction to buy land with it. See stats. 51 & 52 Vict. c. 42, s. 4; 54 & 55 Vict. c. 73. When land has been already devoted to charitable purposes, the conveyance thereof to other trustees, or to another charity does not fall within the purview of the Mortmain Act: *Walker* v. *Richardson*, 2 M. & W. 882; *A.-G.* v. *Glyn*, 12 Sim. 84; *Ashton* v. *Jones*, 28 Beav. 460. By stat. 33 & 34 Vict. c. 34, the investment on mortgage of land of any money held by any corporation or trustees for any public or charitable purpose is exempted from the conditions of the Mortmain Act, and also from any forfeiture for alienation of land into mortmain.

(*l*) Stat. 54 & 55 Vict. c. 73, s. 5; see *Re Bridger*, 1894, 1 Ch. 297; *Re Hume*, 1895, 1 Ch. 422.

(*m*) See stats. 51 & 52 Vict. c. 42, Part III.; 54 & 55 Vict. c. 73, s. 10; 55 & 56 Vict. c. 11, 29 (s. 10); Shelford on Mortmain, 46—49, 57, 241, 255, 256; 1 Jarm. Wills, 202—204, 5th ed.); Index to Statutes, Mortmain, 2, 3. As to the conveyance of land for sites for schools, see stats. 4 & 5 Vict. c. 38, ss. 2, 10, 16; 7 & 8 Vict. c. 37, s. 3; 12 & 13 Vict. c. 49, ss. 3, 4; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49; for sites for literary, scientific and like institutions, stat. 17 & 18 Vict. c. 112, ss. 1, 13, 14; for recreation grounds and playgrounds, stat. 22 Vict. c. 27; for sites for places of worship or burial, stats. 30 & 31 Vict. c. 133; 36 & 37 Vict. c. 50, ss. 1, 4; 45 & 46 Vict. c. 21; for dwellings for the working classes, stat. 53 & 54 Vict. c. 16.

(*n*) Stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31; see 2 Dart V. & P. 1003 *sq.*, 6th ed.

valuable consideration (*o*). The transfer of property as a free gift is called a voluntary conveyance; while a conveyance or a promise is said to be made for valuable consideration, when something is exacted in return for it; not necessarily the payment of money, but anything which is a burden on the party accepting the conveyance or promise, and on which the other sets a value (*p*). The effect of this construction of the statute of Elizabeth was that any person who made a voluntary settlement of landed property, even on his own children, might afterwards sell the same property to any purchaser; and the purchaser, even though he had full notice of the settlement, could hold the lands without danger of interruption from the persons on whom they had been previously settled (*q*). If, however, the settlement were founded on any valuable consideration, such as that of an intended marriage, it could not be defeated (*r*). And if one, to whom land had been voluntarily conveyed, conveyed the same to another for value, the latter could not be deprived of his right to the land by subsequent purchasers from the maker of the voluntary conveyance (*s*). But the judicial interpretation of this statute with respect to voluntary conveyances was removed by an Act of 1893, since the passing of which no voluntary conveyance of lands, made *bonâ fide* and without any fraudulent intent, can be defeated by reason of any subsequent purchase for value (*t*). Voluntary conveyances, and also conveyances tending to defraud creditors, though made

Valuable consideration.

Conveyances void as against creditors.

(*o*) This construction of the Act was not applied to voluntary conveyances to a charity: *Ramsay* v. *Gilchrist*, 1892, A. C. 412.

(*p*) See Holmes on the Common Law. 253. 267—271. 289—297; Dart. V. & P. 1003 *sq.*. 6th ed.; Wms. Pers. Prop. 159, 15th ed.

(*q*) *Upton* v. *Bassett*, Cro. Eliz. 444; 3 Rep. 83 a; Sug. V. & P. ch. 22, s. 1; Sug. Pow. ch. 14.

(*r*) *Colville* v. *Parker*, Cro. Jac. 158; Sug. Pow. ch. 14.

(*s*) *Prodgers* v. *Langham*, 1 Sid. 133; Sug. V. & P. 719, 720; 2 Dart. V. & P. 1019, 6th ed.

(*t*) Stat. 56 & 57 Vict. c. 21, passed 29th June, 1893, and saving previous avoidances of voluntary conveyances under the rule in question.

for value, are liable to become void as against creditors, as will be explained in treating of creditors' rights (*u*).

Free enjoyment by tenant in fee simple.

Tenant in fee simple has the right of *free* enjoyment (*x*) to the fullest extent which is consistent with the security of his neighbours' persons and property (*y*). Thus he may open and work mines (*z*), quarry stone, dig for gravel, plough up ancient meadow land, cut timber, pull down buildings, and generally commit what waste he will (*a*); he may also cultivate his lands as he likes, or may build over them at his pleasure (*b*). But he must not do anything upon his own land which is a nuisance to his neighbours; as carrying on any occupation which endangers their lives or health, injures their property, or unreasonably interferes with their comfort (*c*). And if he bring on to his land any substance, such as water or filth, which is not naturally there, he must keep it in at his own peril (*d*). As we shall see hereafter, the free enjoyment of a tenant in fee may be curtailed by

(*u*) *Post*, ch. xi. If a voluntary conveyance be not made *bonâ fide* twelve months before the grantor's death, or if *bonâ fide* possession be not assumed by the grantee under a voluntary conveyance immediately upon the making thereof, and thenceforward retained to the entire exclusion of the grantor or of any benefit to him by contract or otherwise, or if a voluntary conveyance reserve a life interest or power of revocation to the grantor, estate duty will be payable at his death in respect of the property conveyed; see stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1 c); *post*, ch. x.

(*x*) *Ante*, p. 2.

(*y*) Bract. 221 a, "Licitum est unicuique facere in suo quod damnum injuriosum non eveniet vicino;" see *Corporation of Bradford* v. *Pickles*, 1895, 1 Ch. 145, A. C. 587.

Royal mines.

(*z*) Except gold and silver mines, which belong to the Crown; *The Case of Mines*, 1 Plowd. 310, 336; 1 Black. Comm. 295; *A.-G.* v. *Morgan*, 1891, 1 Ch. 432. See *ante*, p. 34.

(*a*) See 2 Inst. 299; 2 Black. Comm. 282.

(*b*) See *ante*, p. 62. The erection of new buildings in London and other towns is, however, controlled by statute; see Index to Statutes, Metropolis 2, Public Health 3, Towns 1 (b 5).

(*c*) See 3 Black. Comm. 216; Bac. Abr. Nuisance; Joyce on Injunctions, Part I. ch. 1, s. 15; Kerr on Injunctions, ch. 6; Seton on Decrees, 520—528, 5th ed.

(*d*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *National Telephone Co.* v. *Baker*, 1893, 2 Ch. 186; see *Ponting* v. *Noakes*, 1894, 2 Q. B. 281.

the agreement of himself or his predecessors; as in the case of land subjected to rights of way, rights of common, or restrictions in equity as to its use.

Involuntary alienation of lands.

According to modern law, there is generally incident to ownership, not only the right of free disposition, but also the liability to what may be called involuntary alienation of the thing owned at the instance of the owner's creditors. And the lands of a tenant in fee simple are now liable to be taken to satisfy his debts of every kind, not only from his own hands in his lifetime, but also from the hands of those entitled after his death, and even as we shall see, from the hands of purchasers from him. The liability of an estate in land to involuntary alienation affords another instance of a matter in which the law has now attained a certain uniformity, but which cannot be well understood apart from its history. And the explanation of creditors' rights against land involves a long and complicated story. They are, therefore, reserved for subsequent consideration, more especially as they affect all estates in land (*e*). It may be useful, however, to give here the outlines of this liability to alienation at the instance of creditors. From the thirteenth year of Edward I., one-half (*f*), and since the year 1838 the whole (*g*), of a man's freeholds has been liable to be taken *in execution of a judgment* (*h*) for debt or damages against him; the creditor having the right to hold the land so taken till his claim be satisfied out of the profits, and being enabled of late years to obtain a sale of the property and payment out of the proceeds (*i*). A man has been liable to be divested of his freeholds upon *bankruptcy* ever since a statute of Henry VIII. (*k*) first

(*e*) See *post*, ch. xi.
(*f*) Stat. 13 Edw. I. c. 18.
(*g*) Stat. 1 & 2 Vict. c. 110, s. 11.
(*h*) See *ante*, p. 24, and n. (*c*) thereto.
(*i*) See stats. 1 & 2 Vict. c. 110, s. 13; 27 & 28 Vict. c. 112, ss. 4—6.
(*k*) Stat. 34 & 35 Hen. VIII. c. 4.

instituted bankruptcy proceedings; the gist of which, as the reader is probably aware, is the surrender of all a debtor's property for his creditors' benefit. And now, when a man is adjudged bankrupt, all his property becomes divisible amongst his creditors, and vests at once in a trustee for them (*l*). By the common law, as settled in Edward the First's reign, the heir of a tenant in fee simple was liable, to the extent of the land descended to him, to satisfy those debts with the payment of which the late tenant had by special contract (that is, by sealed writing (*m*)), expressly charged his heir. And this liability was extended by an Act of William and Mary (*n*) to a devisee. Also, when testamentary alienation was permitted (*o*), fee simple estates were liable to debts charged thereon by the tenant's will. But it was not until the year 1833 that they were subjected to debts of the deceased tenant made without so binding his heir. Since then, however, fee simple estates, whether devised by will or allowed to descend to the heir, have been liable to the payment of all their late owner's debts, including his ordinary debts incurred without sealed writing, which are called simple contract debts (*p*). It may also be mentioned here that special privileges are accorded to the Crown for the recovery of debts due to it, in the way of seizure of the debtor's lands.

Crown debts.

So inherent in ownership is the right of alienation (*q*), that it is impossible for any owner to be divested of it, and yet retain the other advantages of property. And in the same manner the liability of property to alienation for debt cannot by any means be got rid of (*r*). So long as any estate in land is in the

The right and liability to alienation inherent in ownership.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 20.
(*m*) *Ante*, pp. 18, n. (*r*), 32, n. (*d*).
(*n*) Stat. 3 Will. & Mary c. 14.
(*o*) *Ante*, p. 74.
(*p*) See stats. 3 & 4 Will. IV. c. 104; 32 & 33 Vict. c. 46; *ante*, pp. 29, 57, 74.
(*q*) See *ante*, p. 2.
(*r*) 2 Jarm. Wills, 854 *sq.*, 864 *sq.*, 5th ed.

hands of any person, so long does his power of disposition continue (*s*), and so long also continues his liability to have the estate taken from him to satisfy the demands of his creditors (*t*). And any attempt to annex a general restriction on alienation to a gift of any property is void, as being repugnant to the gift (*u*). It is, however, possible to confine the duration of a gift to the period to which it can be personally enjoyed by the grantee. Thus one may give land to or in trust for another until he shall dispose of the same, or shall become bankrupt, or until any act or event shall occur which would cause his personal enjoyment thereof to cease. Personal property may be settled in the same way (*x*). And this is frequently done. In such cases, if the grantee become bankrupt, or attempt to make any disposition of the property, it will not vest in the creditors' trustee, or follow the intended disposition; but the interest which had been given to the grantee will thenceforth entirely cease, in the same manner as where lands are given to a person for life his interest terminates at his death. If, however, a man attempt to settle his *own* property in such a way that he shall enjoy the same until his bankruptcy, on the happening of which, his interest therein shall cease, and the property go over to some other person than the creditors' trustee, the attempted settlement will in general be void as a fraud on the bankruptcy laws (*y*). An exception to

Gift may be confined to period of personal enjoyment.

Exception.

(*s*) Litt. s. 360; Co. Litt. 206 b, 223 a.

(*t*) *Brandon* v. *Robinson*, 18 Ves. 429, 433.

(*u*) See 2 Jarm. Wills, 855 *sq.*, 5th ed.; Williams on Settlements, 134—136: *Re Dugdale*, 38 Ch. D. 176; *Re Elliot*, 1896, 2 Ch. 353; *ante*, p. 2, n. (*c*); cf. p. 70, n. (*q*).

(*x*) *Lockyer* v. *Savage*, 2 Str. 947; *Re Hinton*, 14 Ves. 598; Kay, J., *Re Dugdale*, 38 Ch. D. 176, 180, 181; 2 Jarm. Wills. 869 *sq.*, 5th ed.

(*y*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Merry* v. *Pownall*, 1898, 1 Ch. 306. See *Lester* v. *Garland*, 5 Sim. 205; *Holmes* v. *Penny*, 3 K. & J. 90; *Brooke* v. *Pearson*, 27 Beav. 181; *Knight* v. *Browne*, 7 Jur. N. S. 894; *Ex parte Mackay*, L. R. 8 Ch. 643; *Ex parte Jay*, 14 Ch. D. 19; *Re Detmold*, 40 Ch. D. 585; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; Davidson, Prec. Conv. Vol. III. 108—141, 3rd ed.; 2 Key & Elphinstone, Prec. Conv. 447, n., 4th ed.

this rule prohibiting restriction or alienation occurs in the case of a woman, who is permitted to have property settled on her in such a way that she cannot when married make any disposition of it during the coverture or marriage; but this mode of settlement is of a comparatively modern date (*z*). There are also certain cases in which the personal enjoyment of property is essential to the performance of certain public duties, and in which no alienation of such property can be made; thus a benefice with cure of souls cannot be directly charged or encumbered (*a*). So offices concerning the administration of justice, and pensions and salaries given by the State for the support of the grantee in the performance of present or future duties, cannot be aliened (*b*); though pensions for past services are, generally speaking, not within the rule (*c*).

Husbands and wives.

In addition to the interest which may be created by alienation, either voluntary or involuntary, there are certain rights conferred by law on husbands and wives in each other's lands, by means of which the descent of an estate, from an ancestor to his heir, may partially be

(*z*) *Brandon* v. *Robinson*, 18 Ves. 434; *Tullett* v. *Armstrong*, 1 Beav. 1, 4 M. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav. 34, 4 M. & Cr. 377; stat. 45 & 46 Vict. c. 75, s. 19; Wms. Pers. Prop. 480—484, 493, 15th ed.

(*a*) Stats. 13 Eliz. c. 20; 57 Geo. III. c. 99, s. 1; 1 & 2 Vict. c. 106, s. 1; *Shaw* v. *Pritchard*, 10 B. & C. 241; *Long* v. *Storie*, 3 De G. & S. 308; *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1. But a sequestration of the profits of a benefice may be obtained in execution of a judgment against, or on the bankruptcy of, a beneficed clergyman: 3 Black. Comm. 418: R. S. C. 1883, Order XLIII. rr. 3—5, Appendix H., No. 7; stat. 46 & 47 Vict. c. 52, s. 52.

(*b*) *Flarty* v. *Odlum*, 3 T. Rep. 681; *Littledale* v. *Duke of Montrose*, 4 T. R. 248; *Wells* v. *Foster*, 8 M. & W. 149; *Apthorpe* v. *Apthorpe*, 12 P. D. 192; stats. 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126. But, in case of bankruptcy, the whole or part of the income arising from any office or pension of the bankrupt may be ordered to be paid to the trustee for division amongst the creditors; stat. 46 & 47 Vict. c. 52, s. 53; *Ex parte Huggins*, 21 Ch. D. 85.

(*c*) *M'Carthy* v. *Goold*, 1 Ball & Beatty, 387; *Tunstall* v. *Boothby*, 10 Sim. 542; *Willock* v. *Terrell*, 3 Ex. D. 323, 334. But see stats. 28 & 29 Vict. c. 73, ss. 4, 5; 44 & 45 Vict. c. 58, s. 141; *Lucas* v. *Harris*, 18 Q. B. D. 127; *Croce* v. *Price*, 22 Q. B. D. 429.

defeated. These rights will be the subject of a future chapter. If, however, the tenant in fee simple should not have disposed of his estate in his lifetime, or by his will, and if it were not swallowed up by his debts, his lands would, at common law, descend (subject to any rights of his wife) to the heir at law. As we have seen (*d*), under the Land Transfer Act, 1897, a man's estates in fee simple now devolve, on his death, to his executors or administrator in the first instance; but the heir's title to succeed to them, if not devised away from him, is not destroyed, and if they are not required to satisfy the deceased tenant's debts and testamentary or administration expenses, the heir can require the executors or administrator to convey them to him.

The heir at law.

The heir, as we have before observed (*e*), is a person appointed by the law. He is called into existence by his ancestor's decease, for no man during his lifetime can have an heir. *Nemo est hæres viventis.* A man may have an *heir apparent* or an *heir presumptive*, but until his decease he has no *heir*. The heir *apparent* is the person who, if he survive the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father. The heir *presumptive* is the person who, though not certain to be heir at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus an only daughter is the heiress presumptive of her father; if he were now to die, she would at once be his heir; but she is not certain of being heir, for her father may have a son, who would supplant her, and become heir apparent during the father's lifetime, and his heir after his decease. An heir at law is the only person in whom the law of England vested property, whether he would or not. If I make a conveyance of land to a person in my lifetime, or leave him any property by my will, he may, if he pleases, disclaim taking it, and in

Heir apparent.

Heir presumptive.

(*d*) *Ante*, pp. 29, 74. (*e*) *Ante*, p. 75.

such case it will not vest in him against his will (*f*). But an heir at law, immediately on the decease of his ancestor, became at common law presumptively possessed, or seised in law, of all his lands (*g*). No disclaimer that he might make would have any effect, though, of course, he might, as soon as he pleased, dispose of the property by an ordinary conveyance. Under the Land Transfer Act, 1897 (*h*), the heir still succeeds immediately upon his ancestor's death to the beneficial interest in the lands held by the ancestor in fee simple: but at law the estate of the deceased vests at once in his executors, if he should have left a will appointing executors (*i*); and they become seised of the lands in law in the same manner as the heir formerly became seised. And if the deceased should have left no executor, or died intestate, his fee simple estates vest in his administrator so soon as appointed (*k*). And the heir does not now acquire his ancestor's estate at law (*l*), until the lands have been conveyed to him by the executors or administrator. In these circumstances it does not appear that the heir can divest himself of his beneficial title; but it remains to be decided whether a disclaimer by the heir of the benefit of a conveyance made to him by the executors and administrator can have any effect.

The heir could not disclaim.

The present law.

A title as heir at law is not nearly as frequent now as it was in the times when the right of alienation was more restricted. And when it does occur it is often established with difficulty. This difficulty arises more from the nature of the facts to be proved than from any

(*f*) *Nicloson* v. *Wordsworth*, 2 Swanst. 365, 372.

(*g*) Watkins on Descents, 25, 26 (4th ed. 34).

(*h*) *Ante*, pp. 29, 74.

(*i*) *Re Pawley and London and Provincial Bank*, 1900, 1 Ch. 58.

(*k*) See *ante*, pp. 29, 74: Wms. Pers. Prop. 422, 452, 456, 15th ed. It appears that, where there is no executor, the estate still descends to the heir, pending the appointment of an administrator: see *Re Pilling's Trusts*, 26 Ch. D. 432; *Re Williams's Trusts*, 36 Ch. D. 231: *Larkin* v. *Drysdale*, 1 Victorian L. R. 164.

(*l*) Except of course in the case mentioned in the previous note.

Gradual progress of the law of descents.

uncertainty in the law. For the rules of descent have now attained an almost mathematical accuracy, so that, if the facts are rightly given, the heir at law can at once be pointed out. The accuracy of the law has arisen by degrees, by the successive determination of disputed points. Thus, in the time of Henry II., when the laws of tenure were beginning to be generally developed (*m*), an estate of inheritance held by military tenure descended first to the deceased tenant's eldest or only son; whilst the inheritance of a free sokeman, if anciently divisible, was shared between all his sons; if not, it passed to his eldest or youngest son, according to local custom. In default of sons, all the daughters succeeded in equal shares, whether the late tenant were sokeman or knight. If he had left no children, the descendants of children (*n*) were the next heirs. In default of lineal descendants, the brothers and sisters came in; and if they were dead, their children; then the uncles and their children; and then the aunts and their children; males being always preferred to females, and the inheritance of males or females in equal degree of kinship being governed by the same rules as in the case of sons or daughters (*o*). Bracton, stating the law of the King's Court as to the inheritance of land, gives descent to the eldest of several sons as the rule, and mentions the case of sokemen's land anciently divisible as an exception (*p*). As the term *free sokemen* was not used to denote any but the original class of free sokemen, a limited and diminishing number of men, this exception did not become the rule for land held in *socage* in its later meaning of free tenure by certain service not military. As we have seen, the tenants in socage (in this sense of the word) included many whose services were originally of a military nature (*q*). The lands of

(*m*) *Ante*, p. 15.
(*n*) Glanv. vii. 3.
(*o*) Glanv. vii. 4.
(*p*) Bract. fo. 62 b, 64, 76 a.
(*q*) *Ante*, p. 52, and n. (*f*).

these remained subject to descent to the eldest son, though their tenure lost its military character. And whenever new tenures were created of a nature to be classed as socage, the land followed the general rule of descent (*r*). Thus descent to the eldest of several males in the same degree of kinship was established as the law for all freehold land, whether held by knight's service or in socage; except, as we have seen, in the case of the custom of gavelkind (*s*). In Bracton's time, too, or shortly after, it was established that all descendants *in infinitum* of any person who would have been heir, if living, were allowed to inherit by right of representation. Thus, if the eldest son died in the lifetime of his father, and left issue, *that* issue, though a grandson or granddaughter only, was to be preferred in inheritance before any younger son (*t*). The father, moreover, or any other lineal ancestor, was never allowed to succeed as heir to his son or other descendant. And it was established after Bracton's time, that kindred of the half-blood should be altogether excluded from inheritance (*u*). The rules of descent, thus gradually fixed, long remained unaltered. Lord Hale, in whose time they had continued the same for about 400 years, was the first to reduce them to a series of canons (*x*); which was afterwards admirably explained and illustrated by Blackstone, in his well-known Commentaries; nor was any alteration made till the enactment of the Inheritance Act, 1833 (*y*). By this Act, amongst other important alterations, the father is heir to his son, supposing the latter to leave no issue; and all lineal ancestors are rendered capable of being heirs (*z*); relations of the

(*r*) P. & M. Hist. Eng. Law, ii. 266—268.
(*s*) *Ante*, p. 59.
(*t*) P. & M. Hist. Eng. Law, ii. 281—281.
(*u*) P. & M. Hist. Eng. Law, ii. 284 *sq.*, 300 *sq.*; Litt. s. 6.
(*x*) Hale's Hist. Com. Law, 6th ed., p. 318 *sq.*
(*y*) Stat. 3 & 4 Will. IV. c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20.
(*z*) Stat. 3 & 4 Will. IV. c. 106, s. 6.

half-blood are also admitted to succeed, though only on failure of relations in the same degree of the whole blood (*a*). The Act has, moreover, settled a doubtful point in the law of descent to distant heirs. The rules of descent, as modified by this Act, will be found at large in the ninth chapter.

(*a*) Stat. 3 & 4 Will. IV. c. 106, s. 9.

CHAPTER III.

OF AN ESTATE TAIL.

HAVING considered the incidents of the greatest estate of freehold, that in fee simple (the most absolute property in land which a subject may enjoy) (*a*), let us proceed to examine the lesser estates of freehold. Of these we shall first notice an estate tail, or an estate given to a man *and the heirs of his body*. This is such an estate as will, if left to itself, descend, on the decease of the first owner, to all his lawful issue, —children, grandchildren, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another: and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine. An estate tail may be either *general*, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female*; an estate in *tail male* cannot descend to any but males, and male descendants of males; and cannot, consequently, belong to any one who does not bear the surname of his ancestor from whom he inherited: so an estate in *tail female* can

Estate tail.

General or special.

Male or female.

(*a*) *Ante*, p. 6.

only descend to females, and female descendants of females (*b*). Special estates tail, confined to the issue by a particular wife, are not now common: the most usual kinds of estates tail now given are estates in tail general, and in tail male. Tail female scarcely ever occurs.

Donee in tail.

The owner of an estate tail is called a *donee* in tail, and the person who has given him the estate tail is called the *donor*. And here it may be remarked, that such correlative words as *donor* and *donee*, *lessor* and *lessee*, and many others of a like termination, are used in law to distinguish the person from whom an act proceeds, from the person for or towards whom it is done. The owner of an estate tail is also called a *tenant in tail*, for he holds his land for some lord, as much as a tenant in fee simple (*c*), only for a less estate. But a tenant in tail in possession of land now largely enjoys the advantages of ownership; and, as we shall see, it has long been in his power to *bar the entail*, and thus convert his estate into an estate in fee simple. To explain the nature of an estate tail and its incidents, we must refer briefly to its history.

Tenant in tail.

Collateral relations might inherit a fee.

The reader has been so far made acquainted with the course of descent of a fee (*d*) as to be aware that, as early as the time of Henry II., if the tenant of a fee left no issue, his collateral relations were admitted to succeed as his heirs (*e*). So that an estate, which had been granted to a man and his heirs, descended, on his death, not only to his offspring, but also, in default of offspring, to his other relations in a defined order of succession. Hence if it were wished to confine the inheritance to the offspring of the donee, it became

(*b*) Litt. ss. 13, 14, 15, 16, 21; 2 Black. Comm. 113, 114.
(*c*) *Ante*, pp. 6, 7, 37.
(*d*) *Ante*, p. 19.
(*e*) *Ante*, p. 86.

necessary to limit the estate expressly to him *and the heirs of his body* (*f*), making what was then called a *conditional gift*, by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs at any future time, the land should revert to the donor (*g*). Such a condition was especially implied in a gift of land in frank marriage (*h*). In such cases, therefore, the collateral relations of the donee could never inherit the land as his heirs: for if his issue failed, the donor might resume possession of the land (*i*). But, as in the case of simple fees (*k*), the donee of a fee granted by such a conditional gift gradually acquired the power of alienating the land, first, as against his issue, and then as against his lord. For when one seised of land in fee simple gave it to another and the heirs of his body, this was necessarily accomplished by subinfeudation, and the donor and his heirs remained the lords of the donee and the heirs of his body, who became their tenants (*l*).

To the donee and the heirs of his body.

A conditional gift.

The doctrine, that the heir can only claim by succession, not by purchase (*m*), was applied to conditional as well as simple fees (*n*). This enabled the donee of land to himself and the heirs of his body to dispose of the land as against such heirs (*o*). If, however, the donee had no such heir, or if he had such an heir, who afterwards died without issue, the intention of the gift was, in either case, that the land should revert to the donor. No alienation by the donee was allowed to prevent this in the former case (*p*): but in the latter

Growth of power of alienating land given to a man and the heirs of his body.

(*f*) Bract. fo. 17 b, 47 a, 68 b, 69 a; Co. Litt. 290 b, n. (1), V. 1.

(*g*) 2 Black. Comm. 110; see P. & M. Hist. Eng. Law, ii. 16—19.

(*h*) *Ante*, p. 67; Bract. fo. 20 b.

(*i*) Bract. fo. 69 a.

(*k*) *Ante*, p. 19.

(*l*) *Ante*, p. 39.

(*m*) *Ante*, p. 68.

(*n*) Bract. fo. 17 b.

(*o*) Bracton's Note Book, case 566; Y. B. 44 Edw. III. 3 a, pl. 13.

(*p*) Fitz. Abr. Formedon, 63.

case it was otherwise. For early in the reign of Edward I. it seems to have been considered that, in the case of a gift of land to a man and the heirs of his body, or a similar conditional gift, the birth of issue was a performance of the condition, so as to enable the donee to alien in fee. Upon the birth of issue therefore the donee could dispose of the land to another and his heirs generally; and it was held that such alienation would prevent the land from reverting to the donor, if the issue of the donee came afterwards to an end (*q*). So, too, if the donor had given over the land to some third person in case of the failure of issue of the first donee,—conferring what was afterwards known as an estate *in remainder* expectant on the determination of the interest of the first donee (*r*),—it appears that alienation by the first donee after the birth of issue might have deprived such third person of his right to have the land, if the issue failed. The original intention of such gifts was therefore in a great measure defeated; originally, on failure of the issue the lands reverted to the donor, or remained to the person whom the donor had appointed to succeed in that event; but now nothing was requisite but the mere birth of issue to give the donee a complete power of disposition.

The mere existence of an expectant heir having thus grown up into a reason for alienation, the barons of the time of Edward I. began to feel how small was the possibility that the lands, which they had granted by conditional gifts to their tenants and the heirs of their bodies, should ever revert to themselves again; whilst

(*q*) Stat. 13 Edw. I. c. 1. preamble: Fitz. Abr. Formedon. 62. 65: Plowd. 246; Co. Litt. 19 a: 2 Inst. 333. Conveyance by fine (*ante*, p. 71, n. (*z*)) seems to have been used to bar the donor's right to the reversion of the lands on failure of issue; Fleta, fo. 294 (§ 53), 295 (§ 4); Britton (ed. Nichols), vol. ii. p. 152 and note (*m*); Mirror. ch. v. sect. 5.

(*r*) As to such gifts, see Bract. fo. 18 b, 67 a, 69 a, 262 b: Maitland, L. Q. R. vi. 22; P. & M. Hist. Eng. Law, ii. 23—25.

at the same time they perceived the power of their own families weakened by successive alienations. To remedy these evils, it was enacted in the reign of Edward I. by the famous statute De Donis Conditionalibus (*s*),—and no doubt as was then thought finally enacted,—that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed; so that they, to whom the tenement was given, should have no power to alien it, whereby it should fail to remain unto their own issue after their death, or to revert unto the donor or his heirs, if issue should fail.

Statute *De Donis.*

Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or more properly, an estate in *fee tail* (*feudum talliatum*). The word *tail* is derived from the French word *tailler*, to cut, the inheritance being by the statute *De Donis*, cut down and confined to the heirs of the body strictly (*t*); but, though an estate tail still bears a name indicative of a restriction of the inheritance from any interruption in its course of perpetual descent from father to son, we shall find that in fact the right to establish such exclusive perpetual descent has long since been abolished. When the statute began to operate, the inconvenience of the strict entails, created under its authority, became sensibly felt; children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for

Fee tail.

Inconvenience of strict entails.

(*s*) Stat. 13 Edw. I. c. 1, called also the Statute of Westminster the Second.

(*t*) Litt. s. 18; Co. Litt. 18 b. 327 a, n. (2); Wright's Tenures. 187; 2 Black. Comm. 112; P. & M. Hist. Eng. Law, ii. 19, n. (6).

the tenant's life (*u*). The nobility, however, would not consent to a repeal, which was many times attempted by the commons (*x*), and the Act has never been directly repealed. But at length means were found of evading its operation; for the judges, in construing the statute, had admitted a principle, which afterwards gave a handle to overturn it altogether. It was held that if the tenant in tail disposed of the land, but left *assets*, or lands of equal value, to his issue, the issue were bound to abide by his alienation of the entailed lands (*y*). This seems fair enough, but the principle of recompense in value was afterwards extended so as to bar the issue from asserting their rights to the entailed lands, if a mere *judgment* had been given entitling them to recover from some other person lands of equal value instead. It is uncertain when this extension of the principle was first admitted (*z*): but it was recognized in a case, called *Taltarum's case*, decided in the twelfth year of the reign of King Edward IV. (*a*). And as the principle so extended was allowed to hold good, although the judgment for recovery in value had been obtained by collusion with the tenant in tail, the result was to secure the practical abolition of the law of entail. For it became possible for any one possessed of land as tenant in tail to get rid of the entail by taking the requisite judicial proceedings.

Alienation by tenant in tail.

Principle of recompense in value barring issue in tail.

Taltarum's case.

By the common law, final judgment for the recovery of land in a writ of right, the highest form of real action, was not only conclusive of the right to the land, as between the parties to the action, but barred all other

(*u*) 2 Black. Comm. 116.

(*x*) 2 Cru. Rec. 9. 10, 3rd ed.

(*y*) 2 Cru. Rec. 214—217; Litt. s. 712; Co. Litt. 373 b, note (2), 374 b.

(*z*) See an article by Sir H. W. Elphinstone, L. Q. R. vi. 280.

(*a*) Y. B. 12 Edw. IV. 19, translated in Tudor's Leading Cases on Real Property, 695, 3rd ed; Cru. Rec. 217—219; see L. Q. R. ix. 1. xii. 301.

persons' claims unless promptly asserted (*b*). This afforded to a tenant in possession of land an opportunity, in certain cases, of defeating the lawful claims of others to the land, by suffering a recovery of the land to be obtained in a collusive action brought against him. Such proceedings were in fact used to deprive termors of their leases, and by ecclesiastics to evade the statute of Mortmain (*c*), until it was provided by statute (*d*) that in such cases collusive recoveries might be falsified, or annulled (*e*). And, under the statute *De Donis*, if a tenant in tail merely suffered judgment for the recovery of his lands to be obtained in a friendly action against him, it was held that his issue after his death might falsify the recovery, and gain possession of the entailed lands (*f*). Recourse was had therefore to the law of warranty (*g*), whereby one, who had warranted the title to lands given by him to another, was liable to be *vouched to warranty*, that is, called upon to defend any action brought to recover the lands, and to be adjudged to render to his donee lands of equal value, if he failed in his defence (*h*). The tenant in tail then, on the collusive action being brought, vouched to warranty some third person, presumed to have been the original grantor of the estate tail. This third person was accordingly called upon: who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he appeared in Court and admitted the alleged warranty, and then allowed judgment to go against him by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of *equal value* from the

Suffering a recovery.

Warranty.

Vouching to warranty.

(*b*) See *ante*, p. 71, n. (*z*); F. N. B. 6; Co. Litt. 254 b; P. & M. Hist. Eng. Law. ii. 75.

(*c*) See *ante*, pp. 53, 75.

(*d*) See stats. 6 Edw. I. c. 11; 13 Edw. I. c. 3. 4. 32; 21 Hen. VIII. c. 15; Co. Litt. 46 a.

(*e*) Cru. Rec. 2—4. 187, 356.

(*f*) Litt. ss. 688—690; Co. Litt. 361 a.

(*g*) See *ante*, pp. 38, 67.

(*h*) See Glanv. lib. iii.; Bract. fo. 380 *sq.*

defaulter, who had thus cruelly failed in defending his title (*i*). If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default (*k*). But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the Court was usually employed. Still, on the principle above stated (*l*), the mere judgment for recovery in value was held to preclude the issue from subsequently asserting their right to the lands.; so that their claim was effectually defeated, and the estate tail was said to be *barred*. And not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time (*m*). So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates, as we have seen (*n*), are called *remainders* expectant on the estate tail), were equally barred. The demandant, in whose favour judgment was given, became possessed of an estate in fee simple in the lands; for in a recovery the lands were always claimed in fee simple (*o*), and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee simple according to his wishes.

Entail barred.

The reversion barred.

And remainders.

Such a piece of solemn juggling could not long have held its ground, had it not been supported by its substantial benefit to the community; but, as it was, the progress of events tended only to make that certain which at first was questionable; and proceedings on the

(*i*) Co. Litt. 361 b; Black. Comm. 358.
(*k*) 2 Black. Comm. 360.
(*l*) *Ante*, p. 94.
(*m*) 2 Black. Comm. 360; Cru. Rec. 187. 258.
(*n*) *Ante*, p. 92.
(*o*) Co. Litt. 9 b: Cru. Rec. 15.

principle of those above related, under the name of suffering *common recoveries*, maintained their ground and long continued in common use as the undoubted privilege of every tenant in tail. The right to suffer a common recovery was considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void (*p*). Complex, however, as the proceedings above related may appear, the ordinary forms of a *common recovery* in later times were more complicated still; for it was found expedient not to bring the collusive action against the tenant in tail himself, but that he should come in as one vouched to warranty (*q*). The lands were, therefore, in the first place conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the *præcipe* or writ (*r*). The proceedings then took place in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the *præcipe* by another person, called the *demandant;* the tenant in tail was then vouched to warranty by the tenant to the *præcipe*. The tenant in tail, on being vouched, then vouched to warranty in the same way the crier of the Court, who was called the common vouchee. The demandant then craved leave to imparl or confer with the last vouchee in private, which was granted by the Court; and the vouchee, having thus got out of Court, did not return; in consequence of which judgment was given in the manner before mentioned, on which a regular writ was directed to the sheriff to put

Common recoveries.

Tenant to the præcipe.

Demandant.

(*p*) *Mary Portington's case*, 10 Rep. 36; Co. Litt. 224 a, 379 b, n. (1); Fearne C. R. 260; 2 Bl. Com. 116; *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, 4 App. Cas. 51.

(*q*) See Cru. Rec. 244 *sq.*

(*r*) By stat. 14 Geo. II. c. 20, commonly called Mr. Pigott's Act, it was sufficient if the conveyance to the tenant to the præcipe appeared to be executed before the end of the term in which the recovery was suffered; 1 Prest. Con. 61 *sq.*; *Goodright* d. *Burton* v. *Rigby*, 5 T. Rep. 177. Recoveries, being in form judicial proceedings, could only be suffered in term time.

the demandant into possession (*s*). The proceedings, as may be supposed, necessarily passed through numerous hands, so that mistakes were not unfrequently made, and great expense was always incurred (*t*). To remedy this evil an Act of Parliament (*u*) was accordingly passed in the year 1833, on the recommendation of the commissioners on the law of real property. This Act, which in the wisdom of its design, and the skill of its execution, is quite a model of legislative reform, abolished the whole of the cumbrous and suspicious-looking machinery of common recoveries. It has substituted in their place a simple deed, executed by the tenant in tail and inrolled, formerly in the Court of Chancery, and now in the Central Office of the Supreme Court (*x*): by such a deed, a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate in fee simple; thus at once defeating the claims of his issue, and of all persons having any estates in remainder or reversion.

Recoveries abolished.

A common recovery was not, in later times, the only way in which an estate tail might be barred. There was another assurance as effectual in defeating the claim of the issue, though it was inoperative as to the remainders and reversion. This was a fine. The nature of a fine and its effect in barring all claims to the land not made within a year and a day afterwards have been previously explained (*y*). If a fine were levied of entailed lands, the rights of the issue and of those to whom the reversion belonged, were expressly saved by the statute *De Donis* (*z*) from being barred under

A fine.

(*s*) Cru. Rec., ch. 1. p. 12.

(*t*) See 1st Report of Real Property Commissioners, 25.

(*u*) "An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance." Stat. 3 & 4 Will. IV. c. 74, drawn by Mr. Brodie; 1 Hayes's Conveyancing, 155.

(*x*) The inrolment must be within six calendar months after the execution: sect. 41. See sect. 74; stats. 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; R. S. C., 1883, Ord. LXI. r. 9.

(*y*) *Ante*, pp. 71, n. (*z*), 92, n. (*q*).

(*z*) Stat. 13 Edw. I. c. 1.

the old doctrine of non-claim. The power of barring future claims was taken from fines in the reign of Edward III. (*a*); but it was again restored, with an extension, however, of the time of claim to five years, by statutes of Richard III. (*b*) and Henry VII. (*c*); by which statutes also provision was made for the open proclamation of all fines several times in Court, during which proclamation all pleas were to cease; and in order that a fine might operate as a bar after non-claim for five years, it was necessary that it should be levied with proclamations (*d*). A judicial construction of the statute of Henry VII. (*e*), quite apart, as it should seem, from its real intention (*f*), gave to a fine by a tenant in tail the force of a bar to his issue after non-claim by them for five years after the fine: and this construction was confirmed by a statute of the reign of Henry VIII., which made the bar immediate (*g*). Since this time the effect of fines in barring an entail, so far as the issue were concerned, remained unquestioned till their abolition; which took place at the same time, and by the same Act of Parliament (*h*), as the abolition of common recoveries. A deed inrolled in the Central Office of the Supreme Court (*i*) is now substituted, as well for a fine, as for a common recovery.

Proclamations.

Fines abolished.

(*a*) Stat. 34 Edw. III. c. 16, a curious specimen of the conciseness of ancient Acts of Parliament. This is the whole of it: "Also it is accorded that the plea of non-claim of fines, which from henceforth shall be levied, shall not be taken or holden for any bar in time to come."

(*b*) 1 Ric. III. c. 7.

(*c*) 4 Hen. VII. c. 24; see also stat. 31 Eliz. c. 2.

(*d*) By stat. 11 & 12 Vict. c. 70, all fines heretofore levied in the Court of Common Pleas shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines with proclamations.

(*e*) Bro. Abr. tit. Fine, pl. 1; Dyer, 3 a: Co. Litt. 121 a, n. (1); Cruise on Fines, 173.

(*f*) 4 Reeve's Hist. Eng. Law, 135, 138; 1 Hallam's Const. Hist. 14, 17. The deep designs attributed by Blackstone (2 Black. Comm. 118, 354) and some others to Henry VII. in procuring the passing of this statute, are shown by the above writers to have most probably had no existence.

(*g*) 32 Henry VIII. c. 36.

(*h*) 3 & 4 Will. IV. c. 74.

(*i*) Stats. 36 & 37 Vict. c. 66, ss. 16, 77: 42 & 43 Vict. c. 78: R. S. C., 1883, Ord. LXI., r. 9.

Although strict and continuous entails have long been virtually abolished, their remembrance seems still to linger in many country places, where the notion of *heir land*, that must perpetually descend from father to son, is still to be met with. It is needless to say that such a notion is quite incorrect. In families where the estates are kept up from one generation to another, settlements are made every few years for this purpose; thus in the event of a marriage, a life estate merely is given to the husband; the wife has an allowance for pin-money during the marriage, and a rent-charge or annuity by way of jointure for her life, in case she should survive her husband. Subject to this jointure, and to the payment of such sums as may be agreed on for the portions of the daughters and younger sons of the marriage, *the eldest son who may be born of the marriage is made by the settlement tenant in tail.* In case of his decease without issue, it is provided that the second son, and then the third, should in like manner be tenant in tail; and so on to the others: and in default of sons, the estate is usually given to the daughters (*j*). By this means the estate is tied up till some tenant in tail attains the age of twenty-one years; when he is able with the consent of his father, who is tenant for life, to bar the entail with all the remainders. Dominion is thus again acquired over the property, which dominion is usually exercised in a re-settlement on the next generation; and thus the property is preserved in the family.

Settlements.

Primogeniture, therefore, as it obtains among the landed gentry of England, is a *custom* only, and not a *right;* though there can be no doubt that the custom has originated in the right, which was enjoyed by the eldest son, as heir to his father, in those days when estates tail could not be barred. Primogeniture, as a custom, has been the subject of much remark (*k*). Where family

Primogeniture.

(*j*) See the form of a deed of settlement given in Part VI. *post.*

(*k*) See 2 Adam Smith's Wealth of Nations, 181, M'Culloch's ed.

honours or family estates are to be preserved, some such device appears necessary. But, in other cases, strict settlements of the kind referred to seem fitted rather to maintain the posthumous pride of present owners, than the welfare of future generations. The policy of the law is now in favour of the free disposition of all kinds of property; and as it allows estates tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of *living persons*. Thus an estate given, after the death of an *unborn child*, to his children, would be absolutely void (*l*). The desire of individuals to keep their name in memory has often been opposed to this rule of law, and many shifts and devices have from time to time been tried to keep up a perpetual entail, or something that might answer the same end (*m*). But such contrivances have invariably been defeated: and no plan can be now adopted by which lands can with certainty be tied up, or fixed as to their future destination, for a longer period than the lives of existing persons and a term of twenty-one years after their decease (*n*).

A perpetuity.

Whenever an estate tail is not an estate in possession, but is preceded by a life interest to be enjoyed by some other person prior to the possession of the lands by the tenant in tail, the power of such tenant in tail to acquire an estate in fee simple in remainder expectant on the decease of the tenant for life is subject to some limitation. In the time when an estate tail, together with the reversion, could only be barred by a recovery, it was absolutely necessary that the first tenant for life, who

When the estate tail is preceded by a life interest.

The concurrence of the first tenant for life required.

and M'Culloch's n. xix., vol. 4, p. 441. See also Traités de Legislation Civile et Pénale, ouvrage extrait des Manuscrits de Bentham, par Dumont, tom. I, p. 307.

(*l*) *Hay* v. *Earl of Coventry*, 3 T. Rep. 86; *Brudenell* v. *Elwes*, 1 East, 452: *Whitby* v. *Mitchell*, 44 Ch. D. 85.

(*m*) See Fearne, 253 *sq.*: *Mainwaring* v. *Baxter*, 5 Ves. 458.

(*n*) Fearne, C. R. 430 *sq.* The period of gestation is also included, if gestation exist; *Cadell* v. *Palmer*, 7 Bligh, N. S. 202.

had the possession of the lands, should concur in the proceedings; for no recovery could be suffered, unless on a feigned action brought against the tenant seised of the freehold (*o*). This technical rule of law was also a valuable check on the tenant in tail under every ordinary settlement of landed property; for, when the eldest son (who, as we have seen, is usually made tenant in tail) came of age, he found that, before he could acquire the dominion expectant on the decease of his father, the tenant for life, he must obtain from his father consent for the purpose. Opportunity was thus given for providing that no ill use should be made of the property (*p*). When recoveries were abolished, the consent formerly required was accordingly still preserved, with some little modification. The Act abolishing recoveries has established the office of *protector*, which almost always exists during the continuance of such estates under the settlement as may precede an estate tail. And the consent of the protector is required to be given, either by the same deed by which the entail is barred, or by a separate deed, to be executed on or before the day of the execution of the former, and to be also inrolled in the Central Office of the Supreme Court at or previously to the time of the inrolment of the deed which bars the entail (*q*). Without such consent the remainders and reversion cannot be barred (*r*). In ordinary cases the protector is the first tenant for life under the settlement, in analogy to the old law (*s*): but a power is given by the Act, to any person entailing lands, to appoint, in the place of the tenant for life, any number of persons, not exceeding three, to be together protector of the settlement during the continuance of the preceding estates (*t*); and, in

Protector.

His consent required to bar remainders and reversions.

(*o*) Cru. Rec. 21. See, however, stat. 14 Geo. II. c. 20.

(*p*) See First Report of Real Property Commissioners, p. 32.

(*q*) Stats. 3 & 4 Will. IV. c. 74, ss. 42—47; 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; R. S. C., 1883, Ord. LXI., r. 9.

(*r*) Stat. 3 & 4 Will. IV. c. 74, ss. 34, 35.

(*s*) Sect. 22.

(*t*) Sect. 32.

such a case, the consent of such persons only need be obtained in order to effect a complete bar to the estate tail, and the remainders and reversion. The protector is under no restraint in giving or withholding his consent, but is left entirely to his own discretion (*u*). If he should refuse to consent, the tenant in tail may still bar his own issue; as he might have done before the Act by levying a fine; but he cannot bar estates in remainder or reversion. The consequence of such a limited bar is, that the tenant acquires a disposable estate in the land for so long as he has any issue or descendants living, and no longer; that is, so long as the estate tail would have lasted had no bar been placed on it. This is called a base fee. But, when his issue fail, the persons having estates in remainder or reversion become entitled. When the estate tail is in possession, that is, when there is no previous estate for life or otherwise, there can very seldom be any protector (*x*), and the tenant in tail may, at any time by deed duly inrolled, bar the entail, remainders and reversion at his own pleasure. And where a previous estate for life exists, it does not confer the office of protector, unless it be created by the same settlement which created the estate tail: so that a tenant in tail in remainder expectant on an estate for life, created by some prior deed or will, may bar the entail, remainders and reversion, without the consent of the tenant for life under such prior deed or will (*y*).

The issue may be barred without protector's consent.

Base fee.

Estate tail in possession.

Life estate under prior deed or will.

The above-mentioned right of a tenant in tail to bar the entail is subject to a few exceptions; which, though of not very frequent occurrence, it may be as well to mention. And, first, estates tail granted by the Crown as the reward for public services cannot be barred so

Estate tail granted by the Crown as the reward of public services.

(*u*) Stat. 3 & 4. Will. IV. c. 74. ss. 36. 37.

(*x*) See Sugd. V. & P. 593, 11th ed.

(*y*) *Berrington* v. *Scott*. 32 L. T., N. S. 125.

long as the reversion continues in the Crown. This restriction was imposed by an Act of Parliament of the reign of Henry VIII. (*z*), and it has been continued by the Act by which fines and recoveries were abolished (*a*). There are also some cases in which entails have been created by particular Acts of Parliament, and cannot be barred.

Tenant in tail after possibility of issue extinct.

Again, an estate tail cannot be barred by any person who is *tenant in tail after possibility of issue extinct*. This can only happen where a person is tenant in *special* tail. For instance, if an estate be given to a man and the heirs of his body by his present wife; in this case, if the wife should die without issue, he would become tenant in tail after possibility of issue extinct (*b*); the possibility of his having issue who could inherit the estate tail would have become extinct on the death of his wife. A tenancy of this kind can never arise in an ordinary estate in tail general or tail male; for so long as a person lives, the law considers that the possibility of issue continues, however improbable it may be from the great age of the party (*c*). Tenants in tail after possibility of issue extinct were prohibited from suffering common recoveries by a statute of the reign of Elizabeth (*d*), and a similar prohibition is contained in the Fines and Recoveries Act (*e*). But, as we have before remarked (*f*), tenancies in special tail are not now common. In modern times, when it is intended to make a provision for the children of a particular marriage, estates are given directly to the unborn children, which take effect as they come into existence: whereas in ancient times, as we shall

(*z*) Stat. 34 & 35 Hen. VIII. c. 20; Cru. Rec. 318.
(*a*) Stat. 3 & 4 Will. IV. c. 74, s. 18; *Duke of Grafton's case*, 5 New Cases, 27.
(*b*) Litt. ss. 32, 33; 2 Black. Comm. 124.
(*c*) Litt. s. 34; Co. Litt. 40 a; 2 Black. Comm. 125; *Jee* v. *Audley*, 1 Cox, 324.
(*d*) 14 Eliz. c. 8.
(*e*) 3 & 4 Will. IV. c. 74, s. 18.
(*f*) *Ante*, p. 104.

hereafter see (*g*), it was not lawful to give any estate directly to an unborn child.

The last exception is one that can only arise in the case of grants and settlements made before the passing of the Fines and Recoveries Act; for the future it has been abolished. It relates to women who are tenants in tail of lands of their husbands, or lands given by any of his ancestors. After the decease of the husband, a woman so tenant in tail *ex provisione viri* was prohibited by an old statute (*h*) from suffering a recovery without the assent, recorded or inrolled, of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance (that is, in tail or in fee simple) in the lands: she was also prohibited from levying a fine under the same circumstances by the statute which confirmed to fines their force in other cases (*i*). This kind of tenancy in tail very rarely occurs in modern practice, having been superseded by the settlements now usually made on the unborn children of the marriage.

Tenant in tail *ex provisione viri*.

It is important to observe that an estate tail can only be barred by an actual conveyance by deed, duly inrolled according to the Act of Parliament by which a deed was substituted for a common recovery or fine (*k*). Thus every attempt by a tenant in tail to leave the lands entailed by his will (*l*), and every contract to sell them, not completed in his lifetime by the proper bar (*m*), will be null and void as against his issue claiming under the entail, or as against the remaindermen or reversioners (that is, the owners of estates in remainder or reversion), should there be no such issue left.

An estate tail cannot be barred by will or contract.

(*g*) See the Chapter on a Contingent Remainder.

(*h*) 11 Hen. VII. c. 20.

(*i*) Stat. 32 Hen. VIII. c. 36, s. 2.

(*k*) *Peacock* v. *Eastland*, L. R. 10 Eq. 17.

(*l*) Cro. Eliz. 805; Co. Litt. 111 a; stat. 3 & 4 Will. IV. c. 74. s. 40.

(*m*) Bac. Abr. tit. Estate in Tail (D); stat. 3 & 4 Will. IV. c. 74. s. 40.

Powers of alienation exercisable without barring the entail.

We see, then, that the most important right of alienation enjoyed by a tenant in tail is his power to bar the entail by deed inrolled, and so acquire the fee simple with all its attendant advantages (*n*). A tenant in tail, as such, has, however, certain limited powers of alienation, which he may exercise without barring the entail. By the common law, any disposition of his lands made by a tenant in tail will hold good during his life (*o*). And he is by statute (*p*) empowered to make certain dispositions which will bind his issue, as well as the reversioners or remaindermen. Thus the Fines and Recoveries Act empowers every tenant in tail in possession to make leases by deed, without the necessity of inrolment, for any term not exceeding twenty-one years, to commence within a year of the date of the lease, at a rack rent (*q*), or not less than five sixth parts of a rack-rent (*r*). And the Settled Land Act, 1882 (*s*), gives the powers of a tenant for life under that Act to each of the following persons, when entitled in possession, namely: A tenant in tail, except a tenant in tail of land purchased with money provided by Parliament in consideration of public services, who is restrained by Act of Parliament from barring the entail (*t*): a person entitled to a base fee (*u*);

(*n*) *Ante*, pp. 65, 90, 98.

(*o*) Litt. ss. 595—600, 606—608, 649, 650.

(*p*) Stat. 32 Hen. VIII. c. 28, repealed by stat. 19 & 20 Vict. c. 120, s. 35, gave to tenants in tail a limited power to make leases binding on their issue only; see Co. Litt. 44 a, 45 b; 2 Black. Comm. 319; Bac. Abr. Leases and Terms for Years (D) 2.

(*q*) "Rack-rent is only a rent of the full value of the tenement, or near it": 2 Black. Comm. 43.

(*r*) Stat. 3 & 4 Will. IV. c. 74, ss. 15, 40, 41. And under the Settled Estates Act, 1877, stat. 40 & 41 Vict. c. 18, s. 46, replacing an Act of 1856, a tenant in tail in possession has the same power of leasing as is thereby given to a tenant for life: see *post*, p. 118, n. (*m*).

(*s*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (i.), (iii.), (vii.): Wms. Conv. Stat. 361—364.

(*t*) If the land were not purchased with money so provided, the tenant in tail may exercise the powers given by the Act, although he be restrained by Act of Parliament from barring the entail, and although the reversion be in the Crown: *Re Duke of Marlborough's Blenheim estates*, 8 Times L. R. 582: see *ante*, pp. 103, 104.

(*u*) Although the reversion be in the Crown. See *ante*, pp. 103, 104.

and a tenant in tail after possibility of issue extinct (*x*). This enables every tenant in tail in possession (with the exception above specified) to grant all such leases as a tenant for life may grant under the same Act, and also to sell or exchange his land without the necessity of barring the entail. But in such cases the proceeds of a sale, and any capital money arising upon the grant of a lease, and any land taken in exchange, will become subject to the entail. Leases and sales under the Settled Land Act will be explained in the next chapter.

Sale and exchange.

As regards the right of free enjoyment, a tenant in tail is on an equal footing with a tenant in fee simple (*y*); he may cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail for the purpose (*z*).

Free enjoyment.

Waste.

If a tenant in fee simple make a gift of his lands for an estate tail, a tenure will still be created between donor and donee; for the statute of *Quia Emptores* only prohibits subinfeudation upon gifts of land in fee simple (*a*). And upon the creation of such a tenure, any services or rent might be reserved (*b*). But as estates tail have from the earliest time been chiefly used for the purpose of family settlement (*c*), it has long been unusual specially to subject tenants in tail to performance of service or payment of rent. If no services were specially reserved on a gift in tail the donee held of the donor by the same services as the latter held of his superior lord, except in the case of a gift in frank-marriage (*d*). Thus in the days of military tenures, tenants in tail might be subject to homage, aids, and the lord's rights of wardship and marriage, as well as

Tenure of estate tail.

(*x*) *Ante*, p. 104.
(*y*) *Ante*, p. 79.
(*z*) Co. Litt. 224 a; 2 Black. Comm. 115; Ca. t. Talb. 16; 3 Madd. 531; Joh. 752.
(*a*) Stat. 18 Edw. I. c. 1, *ante*, p. 39; Kitchen on Courts, 410; Watk. Desc., p. 4, n. (*m*), pp. 11, 12, 4th ed.
(*b*) Co. Litt. 23 a.
(*c*) *Ante*, pp. 67, 91, 100.
(*d*) Litt. s. 19; see *ante*, p. 67.

Fealty.

tenants in fee simple (*e*). These burdens were abolished in 1645, as we have seen (*f*). An oath of fealty is, however, still incident to the tenure of an estate tail: but, as in other cases, it is never exacted (*g*).

Husband and wife.

In addition to the liabilities above mentioned are the rights which the marriage of a tenant in tail confers on the wife, if the tenant be a man, or on the husband, if the tenant be a woman; an account of which will be contained in a future chapter on the relation of husband and wife. But, subject to these rights and liabilities,

Descent of an estate tail.

an estate tail, if not duly barred, will descend to the issue of the donee in due course of law; all of whom will be necessarily tenants in tail, and will enjoy the same powers of disposition as their ancestor, the original donee in tail. The course of descent of an estate tail is similar, so far as it goes, to that of an estate in fee simple, an explanation of which the reader will find in the ninth chapter.

Effect of the Land Transfer Act, 1897, as to estates tail.

The wording of the Land Transfer Act, 1897 (*h*), which provides that a man's real estate shall, on his death, notwithstanding any testamentary disposition, devolve to his personal representatives (*i*), has left open

(*e*) Litt. ss. 90, 103; Co. Litt. 23 a, 76 a b, 77 a; 8 Rep. 166; *ante*, p. 47.

(*f*) *Ante*, p. 54.

(*g*) Litt. s. 91; Co. Litt. 67 b, 68 b, n. (5). It has been observed (*ante*, p. 93) that, in ancient times, estates tail were not subject to forfeiture for high treason beyond the life of the tenant in tail. This privilege they were deprived of by an Act of Henry VIII., by which all estates of inheritance (under which general words estates tail were covertly included) were declared to be forfeited to the king upon any conviction of high treason. The attainder of the ancestor did not of itself prevent the descent of an estate tail to his issue, as they claimed from the original donor *per formam doni*: and, therefore, on attainder for felony (other than treason), an estate tail still descended to the issue. As we have seen, forfeiture for treason and attainder were abolished in 1870. See stats. 26 Hen. VIII. c. 13, s. 5; 5 & 6 Edw. VI. c. 11, s. 9; 3 Rep. 10; 8 Rep. 165 b; Cro. Eliz. 28; Black. Comm. ii. 118, iv. 385; *ante*, pp. 48, 55.

Forfeiture for treason.

Attainder.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 1.

(*i*) A dead man's personal representatives are his executors or administrators; *ante*, pp. 20, 21.

the question whether an estate tail now vests in the executors or administrator of a deceased tenant in the same manner as an estate in fee simple (*k*). But it may be contended that the Act is intended to apply only to *devisable* real estate, and does not, therefore, affect the descent of an estate tail (*l*).

(*k*) *Ante*, pp. 29, 74.

(*l*) As to this, and as to the liability of an estate tail to debts, see ch. ix., xi., *post*.

CHAPTER IV.

OF AN ESTATE FOR LIFE.

Having examined freehold estates of inheritance in fee simple and fee tail, let us proceed to consider freehold estates not of inheritance (*a*), the chief of which is an estate for life. This gives the tenant the right to hold the lands during his life; but his interest therein ceases at his death, and does not pass to his heirs or other representatives. In connection with the gift of a life estate, we may notice an ancient rule of law, which has come down to us from Bracton's day, that if a grant of land be made to a man, without further words expressly conferring on him an estate transmissible to his heirs, he takes an estate for life only (*b*). At the present day we are so used to the transmission of the rights arising from act or agreement between one man and another, that we are apt to regard as exceptional any case, in which the legal relations so created are not extended to the parties' representatives after their death. But in the days of the early common law it was rather presumed that the legal relations, into which men entered by their own act, were personal to themselves, unless the contrary were expressed (*c*). In those days, moreover, when subinfeudation prevailed (*d*), gifts of

A grant to A. B. simply confers only a life estate.

(*a*) *Ante*, p. 63.

(*b*) Bract. fo. 27 a, 92 b, 263 a: Bracton's Note Book, cases 1235, 1811; Fleta, fo. 193; Litt. ss. 1, 283; Co. Litt. 42 a; 2 Black. Comm. 121; *Lucas* v. *Brandreth*, 28 Beav. 274; *Symes* v. *Symes*, 1896, 1 Ch. 272, 276.

(*c*) See Bract. fo. 26 b, 101 a, 170 a b, 192 b, 194 b, 199 a, 218 b, 268 b: cf. *Ratcliff* v. *Davis*, 1 Bulst. 29. Compare the early conception of contract and wrong as matters personal to those between whom the obligation was created: Wms. Pers. Prop. 29, 30, 15th ed.

(*d*) *Ante*, p. 38.

land were not interpreted (*e*) upon the principle subsequently established, that every grant is to be construed most strongly against the grantor (*f*). And I do not suppose that it shocked the common sense of Bracton's time (*g*), that a gift of land to one by name would give him the land as long as he could live to enjoy it; but would give him no fee (*h*), unless it were expressed that his heirs should succeed him.

However reasonable such a construction may have been when gifts of land were rarely made by a transfer of the donor's whole interest (*i*), the rule in question had ceased to accord with the common sense of laymen, by the time that an estate in fee simple had become practically equivalent to absolute ownership (*k*). Nevertheless the rule remained a dry technicality embedded in the law. Its most remarkable effect was its frequent defeat of the intentions of unlearned testators (*l*), who, in leaving their lands and houses to the objects of their bounty, were seldom aware that they were conferring only a life interest; though if they extended the gift to the *heirs* of the parties, or happened to make use of the word *estate*, or some other such technical term, their gift or devise included the whole extent of the interest they had power to dispose of (*m*). As may be imagined, the questions raised by this rule were sufficiently

This rule often defeated testator's intentions.

(*e*) See Bract. fo. 48 a.

(*f*) Co. Litt. 36 a, 48 a: Shep. Touch. 88: *Doe* d. *Daris* v. *Williams*, 1 H. Bl. 25; Broom's Legal Maxims, 594, 5th ed.

(*g*) If it had, I think Bracton would probably have said so. Anyone who reads Bracton's remarks (fo. 440 b) on the hardship of the impossibility of obtaining final judgment in default of appearance in a personal action (a hardship first removed in 1832, see Wms. Pers. Prop. 18, n. (*e*), 15th ed.), must be convinced that he was no pedant of the dark ages, but an enlightened critic of the law, who could appreciate the harshness of a technical rule, and, what is more, suggest a sound reform.

(*h*) *Ante*, p. 19.

(*i*) *Ante*, p. 38.

(*k*) *Ante*, pp. 27, 65.

(*l*) 2 Jarman on Wills, 267, 4th ed., and the cases there cited.

(*m*) "Generally speaking," said Lord Mansfield in *Hogan* v. *Jackson*, Cowp. 306, "no common person has the smallest idea of

numerous till at length a statutory remedy was applied. And now, in wills made after the year 1837, a devise of real estate without any words of limitation (*n*) shall be construed to pass the fee simple, or other the whole estate or interest, of which the testator had power to dispose, unless a contrary intention shall appear (*o*). But the old rule is still in force with regard to deeds (*p*). To confer a life estate, however, it is usual and proper to limit the lands to the grantee "during his life" (*q*).

Tenure of life estate.

If a tenant in fee simple grant land to another for life, a tenure will be created between the parties, as in the case of a gift in tail (*r*); and on such a grant any rent or services may be reserved (*s*). In early times after the Conquest life estates seem chiefly to have arisen under leases at money rents, mostly granted by ecclesiastical corporations of church lands (*t*). At the present day farming leases are seldom granted for life or lives. Life estates, however, are very common interests in land. But they now almost always arise under the modern system of settlement, which has prevailed since the time of the Commonwealth (*u*); and in which, as we

any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction, which is now clearly established, is this:—If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his *interest* passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator."

(*n*) *I.e.* words used to *limit* or mark out the estate conferred.

(*o*) Stat. 7 Will. IV. & 1 Viet. c. 26. ss. 28, 34.

(*p*) See Elphinstone, Norton and Clark on the Interpretation of Deeds, rule 116, p. 295.

(*q*) Davidson, Prec. Conv. vol. iii. part ii. p. 984, 3rd ed.

(*r*) *Ante*, p. 107.

(*s*) Litt. ss. 56, 57, 132, 214, 215; Gilb. Tenures, 90.

(*t*) Madox, Form. Angl. Nos. 195 *sq.*; Domesday of St. Paul's (Camden Society), xc. 122 *sq.*; Gloucester Cartulary (Rolls series), Nos. 20, 23, 31, 44, and others: Vinogradoff, Vill. in Eng. 330, 331.

(*u*) See Papers read before the Juridical Society, vol. i. p. 45 (a paper written by the late author).

have seen (*x*), a life estate is given to a husband on his marriage, or to an eldest son coming of age, after whose death the lands are limited to his unborn children for successive estates tail. When life estates are so created no rent is reserved. And though an oath of fealty is incident to a life as to every other freehold estate, it has long been practically obsolete (*y*). Fealty.

Every life estate may be determined by the civil death of the party, as well as by his natural death; for which reason in old conveyances the grant was usually made for the term of a man's natural life (*z*). Formerly a person by entering a monastery, and being professed in religion, became dead in law (*a*). But this doctrine is now inapplicable; for there is no longer any legal establishment for professed persons in England (*b*), and our law never took notice of foreign professions (*c*). Civil death may, however, occur by outlawry (*d*), which may still take place in criminal proceedings, though in civil proceedings it is now abolished (*e*). Civil death was formerly occasioned also by attainder for treason or felony; but all attainders are now abolished (*f*). Civil death. Natural life.

With regard to the right of free enjoyment the position of a tenant for life is very different from that of tenant in fee simple or in tail (*g*). Every tenant for life, unless restrained by covenant or agreement, has indeed the common right of all tenants to cut wood for Restricted enjoyment of tenant for life.

(*x*) *Ante*, p. 100.
(*y*) Litt. s. 32; Co. Litt. 67 b, 68 b, n. (5).
(*z*) Co. Litt. 132 a; 2 Black. Comm. 121.
(*a*) 1 Black. Comm. 132.
(*b*) Co. Litt. 3 b, n. (7), 132 b, n. (1); 1 Black. Comm. 132; stat. 31 Geo. III. c. 32, s. 17; 10 Geo. IV. c. 7, ss. 28—37; 2 & 3 Will. IV. c. 115, s. 4. See also Anstey's Guide to the Laws affecting Roman Catholics, pp. 24—27; 23 & 24 Vict. c. 134, s. 7; *Re Metcalfe's Trusts*, 2 De G. J. & S. 122.
(*c*) Co. Litt. 132 b.
(*d*) 4 Black. Comm. 319, 380; Watk. n. 123 to Gilb. Ten.; *ante*, p. 48, and n. (*d*).
(*e*) By stat. 42 & 43 Vict. c. 59, s. 3.
(*f*) By stat. 33 & 34 Vict. c. 23; *ante*, p. 55.
(*g*) *Ante*, p. 55.

fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences (*h*), and also the right to cut underwood and lop pollards in due course (*i*).

Waste.

But he is not allowed to commit any kind of *waste* by voluntary destruction of any part of the premises, which is called voluntary waste (*k*). Thus he may not cut timber (*l*), or plough up ancient meadow land (*m*); and he is not allowed to dig for gravel, brick-earth or stone, except in such pits or places as were open and usually dug when he came in (*n*); nor can he open new mines for coal or other minerals, nor cut turf for sale on bog lands; for all such acts would be acts of voluntary *waste*. But to continue the working of existing mines, or to cut turf for sale in bogs already used for that purpose, is not waste; and the tenant may accordingly carry on such mines and cut turf in such bogs for his own profit (*o*). And it is now held that it is not waste for a tenant for life to fell timber according to the usual course of management of woods, which his predecessors had cultivated for periodical croppings; and he is entitled to the profits of timber so cut (*p*). By an old statute (*q*), the committing of any act of waste was made a cause of forfeiture of the thing or place wasted, in case a *writ of*

(*h*) Co. Litt. 41 b; 2 Black. Comm. 35, 122.

(*i*) *Phillips* v. *Smith*, 14 M. & W. 589. As to thinnings of young timber, see *Pidgeley* v. *Rawling*, 2 Coll. 275; *Bagot* v. *Bagot*, 32 Beav. 509, 518; *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656, 35 Beav. 635; *Honywood* v. *Honywood*, L. R. 18 Eq. 306, 307, 308; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306, 329, 330, 377—380.

(*k*) Co. Litt. 53 a; *Whitfield* v. *Bewit*, 2 P. Wms. 241; Black. Comm. ii. 122, 281, iii. 224; *West Ham, &c.* v. *East London Waterworks Co.*, 1900, 1 Ch. 624, 635, 636. See P. & M. Hist. Eng. Law, ii. 8, 9.

(*l*) *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.

(*m*) *Simmons* v. *Norton*, 7 Bing. 648. See *Duke of St. Albans* v. *Skipwith*, 8 Beav. 354.

(*n*) Co. Litt. 53 b; *Viner* v. *Vaughan*, 2 Beav. 466; *Elias* v. *Snowdon Slate Quarries Company*, 4 App. Cas. 454.

(*o*) Co. Litt. 54 b; *Coppinger* v. *Gubbins*, 3 Jo. & Lat. 397; *Re Maynard's Settled Estate*, 1899, 2 Ch. 347.

(*p*) *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.

(*q*) The Statute of Gloucester, 6 Edw. I. c. 5; 2 Black. Comm. 283; Co. Litt. 218 b, n. (2).

waste were issued against the tenant for life. But this writ, having been superseded in modern times by an action for damages (*r*), was abolished in 1833 (*s*); and a tenant for life is now liable only to pay damages for waste already done, or to be restrained by injunction from cutting the timber or committing any other act of waste which he may be known to contemplate (*t*). It was formerly a question whether a tenant for life were not liable for *permissive*, as well as voluntary waste; that is, for permitting the buildings to go to ruin; but it is now held that he is not (*u*), unless the duty of repair be expressly laid on him by his grantor (*x*). If any timber on the land of a tenant for life were in such an advanced state that it would take injury by standing, he might obtain an order of the Court of Chancery allowing it to be cut; when the profits would be invested for the benefit of the persons entitled on the expiration of the life estate, and the interest paid to the tenant during his life (*y*). And now under the Settled Land Act, 1882 (*z*), a tenant for life, impeachable for waste in respect of timber, may cut and sell any timber growing on his land when ripe and fit for cutting, provided he obtain the consent of the trustees of the settlement or an order of the Court. In such a case he will be entitled to keep one fourth of the net proceeds of the

Writ of waste abolished.

Permissive waste.

(*r*) 2 Wms. Saund. 252, n. (7); 3 Steph. Comm. 532, 6th ed., 442, 11th ed.

(*s*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*t*) See Seton on Decrees, 477 *sq.*, 1479, 5th ed.

(*u*) *Re Cartwright*, 41 Ch. D. 532; see the cases there cited; and Bewes on Waste, 210—223; *Re Freman*, 1898, 1 Ch. 28, 32; *Re Parry & Hopkin*, 1900, 1 Ch. 160.

(*x*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306, 339.

(*y*) *Tooker* v. *Annesley*, 5 Sim. 235; *Waldo* v. *Waldo*, 7 Sim. 261; 12 Sim. 107; *Tollemache* v. *Tollemache*, 1 Hare, 456; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; *Gent* v. *Harrison*, Joh. 517; *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Lowndes* v. *Norton*, 6 Ch. D. 139. And the Settled Estates Acts, 1856 and 1877, empowered the Court to authorize a sale of any timber, not being ornamental timber, growing on any settled estates; stats. 19 & 20 Vict. c. 120, s. 11; 40 & 41 Vict. c. 18, s. 16.

(*z*) Stat. 45 & 46 Vict. c. 38, s. 35.

sale; but the rest must be set aside and applied as capital money arising under the Act.

Without impeachment of waste.

If, however, the estate is given to the tenant by a written instrument (*a*) expressly declaring his estate to be *without impeachment of waste*, he is allowed to cut timber in a husbandlike manner for his own benefit, to open mines, and commit other acts of waste with impunity (*b*); but so that he do not pull down or deface the family mansion, or fell timber planted or left standing for ornament, or commit other injuries of the like nature; all of which are termed *equitable* waste; for the Court of Chancery, administering *equity*, restrained such proceedings (*c*). And now by a provision of the Judicature Act of 1873, which united the old superior courts of law and equity (*d*), a tenant for life without impeachment of waste has no legal right to commit equitable waste, unless an intention to confer such a right expressly appears by the instrument creating his estate (*e*).

Equitable waste.

Right of alienation of tenant for life.

A tenant for life may grant over the land he holds for so long as he shall live: but he could not by the common law make any lawful disposition to endure for a longer period (*f*). And his common law right of alienation is still all that he can exercise for his own exclusive profit.

(*a*) *Dowman's case*, 9 Rep. 10 b.

(*b*) *Lewis-Bowles' case*, 11 Rep. 82 b; 2 Black. Comm. 283; *Burges* v. *Lamb*, 16 Ves. 185; *Cholmeley* v. *Paxton*, 3 Bing. 211, 10 B. & C. 564; *Davies* v. *Wescomb*, 2 Sim. 425; *Woolf* v. *Hill*, 2 Swanst. 149; *Waldo* v. *Waldo*, 12 Sim. 107; *Re Barrington*, 33 Ch. D. 523.

(*c*) 1 Fonb. Eq. 33 n.; *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107; *Burges* v. *Lamb*, 16 Ves. 183; *Day* v. *Merry*, 16 Ves. 375 a; *Wellesley* v. *Wellesley*, 6 Sim. 497; *Duke of Leeds* v. *Earl Amherst*, 2 Phil. 117; *Morris* v. *Morris*, 15 Sim. 505, 3 De G. & J. 323; *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; *Baker* v. *Schright*, 13 Ch. D. 179.

(*d*) Stats. 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83. As to equity and the Court of Chancery, see *post*, ch. vii.

(*e*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. (3).

(*f*) Bract. fo. 11 b, 13 b, 318 a, 323 b, 324 a; Litt. ss. 415, 416, 609—611; Co. Litt. 251 b.

But at the present day a tenant for life has large *powers* of disposing of the lands he holds, for the benefit of those entitled thereto after his death, as well as himself. Powers are means of conveying land independently of the right of alienation incident to the estate in the land. Under the modern system of settling land on one for life, and then on his sons successively in tail (*g*), no valid disposition of the land could be made by virtue of the estates so created, except for the father's lifetime, until a son attained twenty-one; when he could join in barring the entail (*h*). This was obviously inconvenient; and it therefore became usual to give to the tenant for life under a settlement powers of leasing the settled land for certain terms on specified conditions; and leases granted under such powers remained good after his death, for the benefit of his successors under the settlement. It was also usual for settlements to contain powers enabling trustees to sell the settled lands and convey them to purchasers; and with the purchase money to buy other lands to be made subject to the settlement. The exact operation of these powers will be explained in a subsequent part of the book (*i*). For the present it will be enough to say that the devices of modern conveyancers had made it possible for a tenant in fee simple, not only to grant his land to another in fee simple, or for any less estate (*k*), with the rights of alienation incident to the estate conferred, but also to give to others independent powers of disposition over his land, equivalent to the disposing power of a tenant in fee simple. Such powers are known as powers of appointment. They could only arise, in the case of settled land, by express provision of the parties making the settlement (*l*), who

Powers of tenant for life.

Powers of appointment.

(*g*) *Ante*, pp. 100, 112.
(*h*) *Ante*, p. 100.
(*i*) *Post*, part ii. ch. iii.
(*k*) *Ante*, pp. 65, 73.
(*l*) Powers of leasing appear to date from the beginning of the modern system of settlement; and the practice of inserting a power of sale in settlements seems to have grown up during the eighteenth century; see Butler's note (v. 4, 5) to Co.

having the whole fee simple to dispose of, were in a position to create *powers* over as well as *estates* in the land. But now, the Settled Land Act, 1882 (*m*), gives to every tenant for life in possession of land under a settlement, large powers of leasing and also a power of selling or exchanging the settled land. Since these extensive statutory powers have been conferred on a tenant for life, it has been no longer usual to insert in settlements the old express powers of appointment, which were formerly used to effect the same objects. Statutory powers resemble express powers in affording means of conveying the settled land, independently of the right of alienation incident to any estate therein. But their operation does not rest on the same conveyancing device; as they derive their effect from the supreme authority of the statute, which enables the tenant for life lawfully to convey away what, in fact, is not his own.

Scheme of the Settled Land Act, 1882.

The scheme of the Settled Land Act, 1882 (*n*), is to entrust the tenant for life with wide powers of disposition exercisable by him for the benefit of all parties entitled under the settlement (*o*), but to impose such conditions on the exercise of these powers as shall prevent his dealing with the land for his own profit

Litt. 290 b; Bridgman's Precedents in Conveyancing (3rd ed. A. D. 1699), pp. 130, 148, 171, 332; Lilley's Practical Conveyancer (1719), p. 568; 2 Horsman's Conveyancing (1744), pp. 217, 475; 3 Wood's Conveyancing (3rd ed. by Powell, 1793), p. 641; 7 Barton's Conveyancing (3rd ed. 1824), p. 248; 3 Davidson's Prec. Conv. (3rd ed. 1873), pp. 263—269, 479, 556.

Settled Estates Acts of 1856 and 1877.

(*m*) Stat. 45 & 46 Vict. c. 38; see s. 2, sub-ss. 1, 5. The Settled Estates Act, 1877 (stat. 40 & 41 Vict. c. 18), which replaced an Act of 1856, empowers tenants for life under settlements made after the 1st of November, 1856, to make ordinary leases for twenty-one years in England, and thirty-five in Ireland, of any part of their settled estates, except the principal mansion-house and lands usually occupied therewith, at the best rent without fine. Agricultural, mining, building and other leases, and sales of settled estates may also be made under the same Act on application to the Chancery Division of the Court, whatever be the date of the settlement.

(*n*) Stat. 45 & 46 Vict. c. 38. (*o*) Sect. 53.

at the expense of his successor's interests. In particular the Act does not permit him to receive any capital money arising under the Act, but directs its payment to trustees of the settlement for the purposes of the Act (*p*), or into Court (*q*). Thus the Act empowers (*r*) a tenant for life to lease the settled land for any purpose whatever, whether involving waste (*s*) or not, for any term not exceeding (i.) in case of a building lease, ninety-nine years; (ii.) in case of a mining lease, sixty years; (iii) in case of any other lease, twenty-one years in England or Wales (*t*) and thirty-five years in Ireland (*u*). But the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith cannot be leased under this Act without the consent of the trustees of the settlement or an order of the Court: though this restriction does not apply where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent (*x*). Every lease intended to take effect under this Act must be made strictly in accordance with the conditions imposed by the Act. Thus a tenant for life intending to make a lease under this Act, must in general give due notice of his intention to each of the trustees of the settlement and their solicitor, if known to the tenant for life; though persons dealing in good faith with the tenant for life are not concerned to inquire respecting the giving of this notice (*y*). And every

Notice to trustees.

(*p*) See ss. 2 (sub-s. 8), 38, 39; stat. 53 & 54 Vict. c. 69, s. 16.

(*q*) Stat. 45 & 46 Vict. c. 38, s. 22.

(*r*) Sect. 6.

(*s*) *Ante*, p. 114.

(*t*) See s. 1. sub s. 3; Wms. Conv. Stat. 291, 299.

(*u*) Sect. 65, sub-s. 10.

(*x*) Stat. 53 & 54 Vict. c. 69, s. 10, replacing 45 & 46 Vict. c. 38, s. 15.

(*y*) Stat. 45 & 46 Vict. c. 38, s. 45. See stat. 47 & 48 Vict. c. 18, s. 5; *Marlborough* v. *Sartoris*, 32 Ch. D. 616, 623; *Hatten* v. *Russell*, 38 Ch. D. 334; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382; *Re Fisher & Grazebrook's Contract*, 1898, 2 Ch. 660.

lease made under this Act must be by deed (*z*), and be made to take effect in possession not later than twelve months after its date (*a*); it must also reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*b*); and must in other respects conform with the requirements of the statute (*c*). But a lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life without giving any notice to the trustees; such a lease may, moreover, be made by writing under hand only, in cases where the term does not extend beyond three years from the date of the writing (*d*). Building and mining leases are subject to additional special regulations (*e*). A fine received on the grant of a lease under any power conferred by this Act must be applied as capital money arising under this Act (*f*). Under a mining lease made under this Act part of the rent must be set aside and applied as capital money arising under the Act, whether the mines or minerals leased were already opened or in work or not, unless a contrary intention were expressed in the settlement; namely, three fourths of the rent where the tenant for life is impeachable for waste in respect of minerals, and otherwise one fourth; and in every such case the residue of the rent will go as rents and profits (*g*). Powers

Fines on leases.

Rent on mining lease.

(*z*) *Ante*, p. 31, and n. (*r*).

(*a*) Stat. 45 & 46 Vict. c. 38, s. 7, sub-s. 1.

(*b*) Sect. 7, sub-s. 2.

(*c*) Every lease must contain a covenant for payment of rent, and a condition of re-entry on non-payment of rent within thirty days at the outside; and a counterpart of every lease must be executed; sect. 7, sub-ss. 3, 4. And see *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169.

(*d*) Stat. 53 & 54 Vict. c. 69, s. 7.

(*e*) Stats. 45 & 46 Vict. c. 38, ss. 8—10; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69, ss. 8, 9.

(*f*) Stat. 47 & 48 Vict. c. 18, s. 4.

(*g*) Stat. 45 & 46 Vict. c. 38, s. 11. See *ante*, pp. 114—116.

additional to or larger than the powers conferred by this Act may be given to the tenant for life by the deed under which he holds (*h*); and settlements often contain some relaxation of the restrictions imposed by the Act (*i*). Any lease made by a tenant for life otherwise than in accordance with the conditions of the Act will be void as against his successors (*k*), though good for his own life.

Tenant for life's power of sale and exchange.

The Act also empowers a tenant for life to sell or exchange the whole or any part of the settled land (*l*). But exactly the same restriction is imposed on a sale as on a lease by the tenant for life of the principal mansion-house and lands usually occupied therewith (*m*). And due notice of intention to sell must be given to the trustees and their solicitor, as in the case of a lease (*n*). Every sale or exchange must be made at the best price or consideration that can reasonably be obtained (*o*). The proceeds of any sale made under the Act and any money agreed to be paid for equality of any exchange effected under the Act must be paid, not to the tenant for life, but to the trustees of the settlement or into Court, at his option; and will then be applicable by the trustees according to his direction, or under the direction of the Court, in any of the authorized modes of employment of capital money arising

(*h*) See sect. 57.

(*i*) *E.g.*, as to the necessity of giving notice to the trustees, or of setting aside part of the rent on making a mining lease, see Wms. Conv. Stat. 308. 345—347, 506, 526.

(*k*) See *Davies* v. *Davies*, 38 Ch. D. 499, decided on the Settled Estates Act, 1877; *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Chandler* v. *Bradley*, 1897, 1 Ch. 315. A lease made *bonâ fide* in intended exercise of the statutory power may, however, be good as a contract to grant a lease, and so be binding on the lessor's successors; stats. 12 & 13 Vict. c. 26, s. 2; 13 & 14 Vict. c. 17. See stat. 45 & 46 Vict. c. 38, s. 12; Wms. Conv. Stat. 309.

(*l*) Stat. 45 & 46 Vict. c. 38, s. 3. See *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.

(*m*) *Ante*, p. 119; see *Re Sebright's Settled Estates*, 33 Ch. D. 429; *Bruce* v. *Ailesbury*, 1892, A. C. 356.

(*n*) *Ante*, pp. 119, 120; see the cases cited in n. (*y*).

(*o*) Stat. 45 & 46 Vict. c. 38, s. 4.

under the Act (*p*). These are stated in the note (*q*). They chiefly include investment in authorized securities,

(*p*) Stat. 45 & 46 Vict. c. 38, s. 22. See *Re Coleridge's Settlement*, 1895, 2 Ch. 704.

Application of capital money arising under the Settled Land Act, 1882.

(*q*) (Stat. 45 & 46 Vict. c. 38, s. 21.) Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one, and partly in another or others of the following modes (namely):

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (see stat. 56 & 57 Vict. c. 53, pt. i.) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain and Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment in or for any other such securities:

(ii.) In discharge, purchase or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent charge in lieu of tithe, crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii.) In payment for any improvement authorized by this Act (see stats. 46 & 47 Vict. c. 61, s. 29; 50 & 51 Vict. c. 30; *Re Lord Egmont's Settled Estates*, 45 Ch. D. 395; *Re Dalison's Settled Estates*, 1892, 3 Ch. 522):

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (see stat. 53 & 54 Vict. c. 69, s. 14).

(x.) In payment of costs, charges and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act:

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

The Court may also order that the costs of legal proceedings taken

discharge of incumbrances affecting the whole estate in the settled land (*r*), payment for authorized improvements, and purchase of other lands to be made subject to the settlement. Any investment must be in the names or under the control of the trustees (*s*). Capital money arising under the Act is, while uninvested or invested in money securities, made subject to the settlement as effectually as if it were land, and will go to the persons to whom the land, from which it arises, would have gone for the same estates and interests as they would have had in the land; the income of invested capital being paid to the persons who would have been entitled to the income of the land (*t*). For the purpose of carrying into effect the powers of leasing, sale and other powers given by the Settled Land Act, the tenant for life is empowered to convey the settled land by deed for all the estate, which is the subject of the settlement, or for any less estate, as may be required (*u*).

Tenant for life's power of conveyance (*u*).

The powers of a tenant for life under the Settled Land Act are not capable of assignment or release, do not pass to his assignee by operation of law or otherwise, and remain exercisable by him notwithstanding any assignment of his estate (*y*). But this is without

Statutory powers cannot be assigned.

for the protection of settled land be paid out of capital money raised by sale of part of the lands in settlement: *Re De La Warr's Estates*, 16 Ch. D. 587; stat. 45 & 46 Vict. c. 38, ss. 36, 47: *Re Ormrod's Settled Estates*, 1892, 2 Ch. 318.

(*r*) By stat. 53 & 54 Vict. c. 69, s. 11, a tenant for life has power to raise money on mortgage of the settled land for the purpose of discharging an incumbrance thereon, not being an annual sum payable during a life or lives, or during a term of years absolute or determinable.

(*s*) Stat. 45 & 46 Vict. c. 38, s. 22, sub-s. 2.

(*t*) S. 22, sub-ss. 5, 6.

(*u*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12; and 2 & 3 Vict. c. 60, empowered tenants for life under wills to convey, under the direction of the Court of Chancery, the whole estate in their lands, if a sale or mortgage thereof were directed for payment of the debts of the testator. These powers were generally superseded by stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1; now replaced by 56 & 57 Vict. c. 53, ss. 30, 31.

(*x*) See stats. 45 & 46 Vict. c. 38, s. 20, sub-s. 1; 53 & 54 Vict. c. 69, s. 6; *post*, part ii. ch. iii.

(*y*) Stat. 45 & 46 Vict. c. 38, s. 50, sub-s. 1.

prejudice to the rights of any assignee for value of the whole or any part of his estate; which cannot generally be affected without the assignee's consent (*z*). A contract by a tenant for life not to exercise any of his powers under the Act is void (*a*). And any provision in a settlement attempting to forbid a tenant for life to exercise any power under the Act is void (*b*).

Improvement of settled land.

By several Acts of Parliament of the present reign (*c*), and especially by the Improvement of Land Act, 1864 (*d*), facilities have been given for borrowing money to be spent in making improvements on settled land by way of drainage and in a variety of other ways (*e*), and to be repaid with interest by equal instalments extending over a fixed term of years, and charged as a rent-charge upon the inheritance of the land. The instalments are payable by a tenant for life during his lifetime; and he is bound to maintain the improvements made (*f*). And

(*z*) Sect. 50, sub-ss. 3, 4. Stat. 54 & 55 Vict. c. 69, s. 4, excepts assignments made by a tenant for life in consideration of marriage or by way of any family arrangement, not being a security for money advanced. And unless the assignee is actually in possession, his consent is not requisite to the making by the tenant for life of leases under the Act at the best rent without fine.

(*a*) Stat. 45 & 46 Vict. c. 38, s. 50, sub-s. 2.

(*b*) Sect. 51.

Railways or Canals.

Residence.

(*c*) Stats. 8 & 9 Vict. c. 56, replacing 3 & 4 Vict. c. 55; 9 & 10 Vict. c. 101, amended by 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, 13 & 14 Vict. c. 31, and 19 & 20 Vict. c. 9; 12 & 13 Vict. c. 100, amended by 19 & 20 Vict. c. 9, and repealed by 27 & 28 Vict. c. 114.

Reservoirs and Water supply.

(*d*) Stat. 27 & 28 Vict. c. 114, amended by 62 & 63 Vict. c. 46.

(*e*) By stat. 45 & 46 Vict. c. 38, s. 30, the Act of 1864 is extended so as to comprise all improvements authorized by the Settled Land Act, 1882; see below, p. 125, n. (*h*). Settled lands may be charged under the Act of 1864 (ss. 78 *sq.*) with the repayment of money subscribed for the construction of railways or canals on or near to them and likely to benefit them. Stats. 33 & 34 Vict. c. 56, and 34 & 35 Vict. c. 84, added to the list of improvements authorized by the Act of 1864 the erection, completion, or improvement of a mansion house suitable to the estate, as a residence for its owner, provided that the sum charged for such purposes should not be more than two years' net rental of the whole estate. Stat. 40 & 41 Vict. c. 31 added the erection of reservoirs and other permanent works for the supply of water and empowered subscriptions for the construction of waterworks by a water company to be charged on settled lands; see also stat. 60 & 61 Vict. c. 44.

(*f*) Stats. 8 & 9 Vict. c. 56,

in addition to the facilities so given for raising money to pay for the improvement of land, capital money arising from the sale of settled land or otherwise under the Settled Land Act, 1882 (*g*), may now be applied at the instance of the tenant for life in payment for any improvement authorized by that Act (*h*). But in order to obtain this, the tenant for life is required, before the work is done, to submit to the trustees or the Court a

Improvements under the Settled Land Act, 1882.

Tenant for life must submit a scheme.

ss. 10, 11 ; 9 & 10 Vict. c. 101, ss. 38, 39 ; 12 & 13 Vict. c. 100, ss. 21, 26 ; 27 & 28 Vict. c. 114, ss. 66, 72. Capital money arising under the Settled Land Act, 1882, may now be applied in redeeming such rent charges, when created in respect of an improvement authorized by that Act ; see *ante*, p. 122, n. (*q*) (iii.).

(*g*) Stat. 45 & 46 Vict. c. 38, s. 21 (iii.) ; *ante*, p. 122 ; see *Re Millard's Settled Estates*, 1893, 3 Ch. 116 ; *Re Bristol's Settled Estates*, *ib.* 169.

(*h*) (Sect. 25.) Improvements authorized by this Act are the making or execution on or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely) :

(i.) Drainage, including the straightening, widening or deepening of drains, streams and watercourses :

(ii.) Irrigation ; warping :

(iii.) Drains, pipes and machinery for supply and distribution of sewage as manure :

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water :

(v.) Groynes ; sea walls, defences against water :

(vi.) Inclosing ; straightening of fences ; re-division of fields :

(vii.) Reclamation ; dry warping :

(viii.) Farm roads ; private roads ; roads or streets in villages or towns :

(ix.) Clearing ; trenching ; planting :

(x.) Cottages for labourers, farm servants, and artisans, employed on the settled land or not ; and (by stat. 48 & 49 Vict. c. 72, s. 11) any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate. See stat. 53 & 54 Vict. c. 69, s. 18.

(xi.) Farmhouses, offices and outbuildings, and other places for farm purposes :

(xii.) Saw mills, scutch mills, and other mills, water wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise :

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water, for agricultural, manufacturing, or other purposes, or for domestic or other consumption :

(xiv.) Tramways ; railways ; canals ; docks :

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or

scheme for the execution of the improvement showing the proposed expenditure thereon (*i*). And a certificate of the Board of Agriculture, or of an engineer or surveyor approved by them, certifying that the work has been properly done, and the amount properly payable by the trustees in respect thereof, or else an order of the Court is required before any capital money can be applied in payment for the improvement (*k*). But the Court may, in any case where it appears proper, make an order directing capital money to be applied in payment for any authorized improvement, notwithstanding that a scheme was not submitted, as required, before the execution of

tidal waters, facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals and of things required for mining purposes :

(xvi.) Markets and market places :

(xvii.) Streets, roads, paths, squares, gardens or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land :

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick making, tile making, and other works necessary or proper in connection with any of the objects aforesaid :

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines :

(xx.) Reconstruction, enlargement or improvement of any of those works.

By stat. 53 & 54 Vict. c. 69, s. 13, improvements authorized by the Act of 1882 shall include :

(i.) Bridges :

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let (see *Re De Teissier's Settled Estates*, 1893, 1 Ch. 153 ; *Re Gaskell's Settled Estates*, 1894, 1 Ch. 485) :

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof :

(iv.) The rebuilding of the principal mansion house on the settled land : provided that the sum to be so applied shall not exceed one half of the annual rental of the settled land (see *Re Walker's Settled Estate*, 1894, 1 Ch. 189).

(*i*) Stat. 45 & 46 Vict. c. 38, s. 26, sub-s. 1 : *Re Hotchkin's Settled Estates*, 35 Ch. D. 41 ; see *Re Bulwer Lytton's Will*, 38 Ch. D. 20 ; *Re Norfolk's Estates*, 1900, 1 Ch. 461.

(*k*) Sect. 26, sub-ss. 2, 3 ; stat. 50 & 51 Vict. c. 30.

the improvement (*l*). The tenant for life is required to maintain improvements executed under the Act (*m*); and is protected from impeachment of waste (*n*) in respect of any stone, clay, sand, or other substance properly gotten, or timber properly cut, for the purpose of making or maintaining any such improvement (*o*). Under the same Act (*p*), a tenant for life may join or concur with any other person interested in executing any improvement authorized by the Act, or in contributing to the cost thereof. In all other respects, improvements which a tenant for life may wish to make must be paid for out of his own pocket (*q*).

Other improvements.

Where land is given to a widow during her widowhood, or to a man until he shall become bankrupt (*r*), or for any other definite period of time of uncertain duration, a freehold estate is conferred, as in the case of a gift for life (*s*). Such estates are regarded in law as determinable life estates (*t*); and their incidents are generally the same as those of ordinary life estates. A difference may occur in the right to take the emblements, that is, the right of a tenant to reap the crop that he has sown, though he die or his estate terminate before harvest (*u*). Thus, if a tenant for life die before

Determinable life estates.

Emblements.

(*l*) Stat. 53 & 54 Vict. c. 69. 13. See *Re Ormrod's Settled Estates*, 1892, 2 Ch. 318; *Re Tucker's Settled Estates*, 1895, 2 Ch. 468; *Re Thomas*, 1900, 1 Ch. 319.

(*m*) Stat. 45 & 46 Vict. c. 38, s. 28.

(*n*) *Ante*, p. 116.

(*o*) Sect. 29.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 27.

(*q*) *Nairn* v. *Marjoribanks*, 3 Russ. 582: *Hibbert* v. *Cooke*, 1 Sim. & Stu. 552; *Caldecott* v. *Brown*, 2 Hare, 144; *Horlock* v. *Smith*, 17 Beav. 572; *Dunne* v. *Dunne*, 7 De Gex, M. & G. 207; *Dent* v. *Dent*, 30 Beav. 363; *Re Leigh's Estate*, L. R. 6 Ch. 887; *Drake* v. *Trefusis*, L. R. 10 Ch. 364; *Re Broadwater Estate*, 33 W. R. 738; *Re De Teissier's Settled Estates*, 1893, 1 Ch. 153; *Re Gerard's Settled Estates*, 1893, 3 Ch. 252; *Re Montagu*, 1897, 2 Ch. 8.

(*r*) *Ante*, p. 82.

(*s*) *Ante*, p. 63.

(*t*) Co. Litt. 42 a; 2 Black. Comm. 121; *Re Carne's Settled Estates*, 1899, 1 Ch. 324, 329.

(*u*) See 1 Wms. Exors. 709 *sq.*, 7th ed.; 622 *sq.*, 9th ed.; Wms. Pers. Prop. 133, 15th ed.

harvest, his executors will be entitled to the emblements, whether his estate were absolute or determinable; and his assignee or undertenant will have the same right. But if the estate should determine by the tenant's own act, as by the marriage of a widow holding during her widowhood, the tenant would have no right to emblements: though the under-tenant, being no party to the cesser of the estate, would still be entitled in the same manner as on the expiration of the estate by death (*x*).

Tenants at rack-rent.

With respect to tenants at rack-rent (*y*), it is now provided that where the lease or tenancy of any farm or lands held by such a tenant shall determine by the death or cesser of the estate of any landlord entitled for his life, or any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, paying a proportionate rent to the succeeding owner (*z*).

Apportionment of rent.

By the common law, if lands were let reserving rent periodically, as on the usual quarter days, nothing was *due* from the lessee until the day when the rent became *payable* (*a*). Hence, in old times, if a tenant for life had let the lands reserving rent quarterly or half-yearly, and died between two rent-days, no rent was due from the under-tenant to anybody from the last rent-day till the time of the decease of the tenant for life. But in the reign of King George II. a remedy for a proportionate part of the rent, according to the time such tenant for life lived, was given by Act of Parliament to his executors or administrators (*b*). Formerly, also, when a tenant for life had a power of leasing (*c*), and let

(*x*) Co. Litt. 55 b; 2 Black. Comm. 122—124; see *Graves* v. *Weld*, 5 B. & Ad. 105.

(*y*) *Ante*, p. 106, n. (*q*).

(*z*) Stat. 14 & 15 Vict. c. 25, s. 1; *Haines* v. *Welch*, L. R. 4 C. P. 91.

(*a*) Co. Litt. 292 b; 3 Rep. 128.

(*b*) See stats. 11 Geo. II. c. 19, s. 15; 4 & 5 Will. IV. c. 22, s. 1; *Ex parte Smyth*, 1 Swanst. 337, and the learned editor's note.

(*c*) See *ante*, p. 117.

the lands accordingly, reserving rent periodically, his executors had no right to a proportion of the rent, in the event of his decease between two quarter days; and, as rent is not due till midnight of the day on which it is made payable, if the tenant for life had died even on the quarter-day, but before midnight, his executors lost the quarter's rent, which went to the person next entitled (*d*). But by an Act of 1834 (*e*), the executors and administrators of any tenant for life who had granted a lease since the passing of the Act, might claim an apportionment of the rent from the person next entitled, when it should become due. This Act, however, did not apply unless the demise was made by an instrument in writing (*f*). But the Apportionment Act, 1870 (*g*), now provides that all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Apportionment Act, 1870.

If a tenant for his own life assign his estate to another, the assignee will become entitled to an estate for the life of the former. This, in the Norman-French, with which our law still abounds, is called an estate *pur autre vie* (*h*); and the person for whose life the land is holden is called the *cestui que vie*. An estate *pur autre vie* has long been an estate of freehold (*i*); though in early times this was not so (*k*). In this case, as well as in that of an original grant, the new owner was formerly

An estate *pur autre vie.*

(*d*) *Norris* v. *Harrison*, 2 Mad. 268.

(*e*) Stat. 4 & 5 Will. IV. c. 22, s. 2; *Lock* v. *De Burgh*, 4 De G. & S. 470; *Plummer* v. *Whiteley*, Joh. 585; *Llewellyn* v. *Rous*, L. R. 2 Eq. 27.

(*f*) See *Cattley* v. *Arnold*, 1 J. & H. 651; *Mills* v. *Trumper*, L. R. 4 Ch. 320.

(*g*) Stat. 33 & 34 Vict. c. 35, s. 2; *Haslock* v. *Pedley*, L. R. 19 Eq. 271; *Constable* v. *Constable*, 11 Ch. D. 681; *Re Howell*, 1895, 1 Q. B. 844; see *Ellis* v. *Rowbotham*, 1900, 1 Q. B. 740.

(*h*) Litt. s. 56.

(*i*) Litt. s. 57.

(*k*) Bract. fo. 26 b, 263 a; Fleta, fo. 192, 289.

entitled only so long as he lived to enjoy the property, unless the grant were expressly extended to his heirs; so that, in case of the decease of the new owner in the lifetime of the *cestui que vie*, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate (*l*). No person having, therefore, a right to the property, anybody might enter on the land, and he that first entered might lawfully retain possession so long as the *cestui que vie* lived (*m*). The person who had so entered was called a *general occupant*. If, however, the estate had been granted to a man *and his heirs* during the life of the *cestui que vie*, the heir might enter and hold possession; and in such a case he was called in law a *special occupant*, having a special right of occupation by the terms of the grant (*n*). To remedy the evil occasioned by property remaining without an owner, it was provided by a clause in a famous statute passed in the reign of King Charles II. (*o*), that the owner of an estate *pur autre vie* might dispose thereof by his will; that if no such disposition should be made, the heir, as occupant, should be charged with the debts of his ancestor; or in case there should be no special occupant, it should go to his executors or administrators, and be subject to the payment of his debts, of course only during the residue of the life of the *cestui que vie*. In the construction of this enactment a question arose, whether or not, supposing the owner of an estate *pur autre vie* died without a will, the administrator was to be entitled for his own benefit, after paying the debts of the deceased. An explanatory Act was accordingly passed in the reign of King George II. (*p*), by which

General occupant.

Special occupant.

Statute of Frauds.

(*l*) In very early times the law was otherwise: Bract. fo. 27 a, 263 a; Fleta, fo. 192, 289; P. & M. Hist. Eng. Law. ii. 80.

(*m*) Co. Litt. 41 b; 2 Black. Comm. 258.

(*n*) *Atkinson* v. *Baker*. 4 T. Rep. 229.

(*o*) The Statute of Frauds, 29 Car. II. c. 3, s. 12.

(*p*) Stat. 14 Geo. II. c. 20, s. 9; see Co. Litt. 41 b, n. (5).

the surplus, after payment of debt, was, in case of intestacy, made distributable amongst the next of kin, in the same manner as personal estate. By the Wills Act of 1837 (*q*), the above enactments were both replaced by more comprehensive provisions to the same effect. And under the Land Transfer Act, 1897 (*r*), on the death of a tenant *pur autre vie*, his estate devolves in the first instance upon his executors or administrator, whether he have devised the same or not, and notwithstanding that he leave a special occupant. But the Act does not disturb the beneficial title of a devisee or special occupant, who may, if the estate be not required to satisfy the deceased tenant's debts and testamentary or administration expenses, require the executors or administrator to convey the same to him.

Modern enactments.

When one person has an estate for the life of another, it is evidently his interest that the *cestui que vie*, or he for whose life the estate is holden, should live as long as possible; and, in the event of his decease, a temptation might occur to a fraudulent owner to conceal his death. In order to prevent any such fraud, it is provided, by an Act of Queen Anne (*s*), that any person having any claim in remainder, reversion or expectancy, may, upon affidavit that he hath cause to believe that the *cestui que vie* is dead, and that his death is concealed, obtain an order from the Lord Chancellor for the production of the *cestui que vie* in the method prescribed by the Act; and if such order be not complied with, then the *cestui que vie* shall be taken to be dead, and any person claiming any interest in remainder, or reversion, or otherwise, may enter accordingly (*t*).

Cestui que vie may be ordered to be produced.

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6; *Re Sheppard*, 1897, 2 Ch. 67.

(*r*) Stat. 60 & 61 Vict. c. 65, Part I.; *ante*, pp. 29, 57, 74, 85, 108.

(*s*) Stat. 6 Anne, c. 18. See *Ex parte Grant*, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; *Re Isaac*, 4 My. & Cr. 11; *Re Lingen*, 12 Sim. 104; *Re Clossey*, 2 Sim. & G. 46; *Re Dennis*, 7 Jur., N. S., 230; *Re Owen*, 10 Ch. D. 166; *Re Stevens*, 31 Ch. D. 320.

(*t*) By s. 5 of the same Act,

Quasi entail.

If an estate *pur autre vie* should be given to a person and the heirs of his body, a *quasi entail*, as it is called, will be created, and the estate will descend, during its continuance, in the same manner as an ordinary estate tail. But the owner of such an estate in possession may bar his issue, and all remainders, by an ordinary deed of conveyance (*u*), without any inrolment under the statute for the abolition of fines and recoveries. If the estate tail be in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainders (*x*).

Persons having the powers of a tenant for life under the Settled Land Act, 1882.

It is important to notice that all the powers of a tenant for life under the Settled Land Act, 1882 (*y*), are by that Act (*z*) expressly conferred on each of the following persons, when entitled in possession :—

(a) A tenant for years determinable on life, not holding merely under a lease at a rent;

(b) A tenant for the life of another, not holding merely under a lease at a rent;

Tenant *pur autre vie*.

(c) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease or be defeated in any event during that life (*a*), or is subject to a trust for accumulation of income.

In addition to estates for life expressly created by the acts of the parties, there are certain life interests, created by construction and operation of law, possessed by husbands and wives in each other's land. These interests will be spoken of in a future chapter. There

tenants *pur autre vie* continuing in possession after the determination of their estates, without the express consent of the persons next entitled, are adjudged to be trespassers, and made liable to pay the full value of the profits received during their wrongful possession.

(*u*) Fearne, C. R. 495 *sq.*

(*x*) *Allen* v. *Allen*, 2 Dru. & War. 307, 324, 332; *Edwards* v. *Champion*, 3 De Gex, M. & G. 202.

(*y*) *Ante*, pp. 118—124.

(*z*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (iv., v., vi., ix.).

(*a*) See *ante*, pp. 82, 127.

are also certain other life estates held by persons subject to peculiar laws; such as the life estates held by beneficed clergymen. These estates are exceptions from the general law; and a discussion of them, in an elementary work like the present, would tend rather to confuse the student than to aid him in his grasp of those general principles, which it should be his first object to comprehend.

CHAPTER V.

OF JOINT TENANTS AND TENANTS IN COMMON.

A GIFT of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of the *time* of the commencement of such title (*a*). Any estate may be held in joint tenancy; thus, if lands be given simply to A. and B. without further words, they will become at once joint tenants for life (*b*). Being regarded, with respect to other persons, as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, A. will be entitled to one moiety of the rents and profits of the land, and B. to the other; but after the decease of either of them, the survivor will be entitled to the whole during the residue of his life. So, if lands be given to A. and B. and the heirs of their two bodies; here, if A. and B. be persons who may possibly intermarry, they will have an estate in special tail, descendible only to the heirs of their two bodies (*c*): so long as

The four unities of joint tenancy.

Joint tenants for life.

Joint tenants in tail.

(*a*) 2 Black. Comm. 180.

(*b*) Litt. s. 283; Com. Dig. tit. Estates (K. 1); see *ante*, p. 110.

(*c*) Co. Litt. 20 b, 25 b; Bac. Abr. tit. Joint Tenants (G).

they both live, they will be entitled to the rents and profits in equal shares; after the decease of either, the survivor will be entitled for life to the whole; and, on the decease of such survivor, the heir of their bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A. and B. had been but one ancestor. If, however, A. and B. be persons who cannot at any time lawfully intermarry, as, if they be brother and sister, or both males, or both females, a gift to them and the heirs of their two bodies will receive a somewhat different construction. So long as it is possible for a unity of interest to continue, the law will carry it into effect: A. and B. will accordingly be regarded as one person, and will be entitled jointly during their lives. While they both live their rights will be equal; and, on the death of either, the survivor will take the whole so long as he may live. But, as they cannot intermarry, it is not possible that any one person should be heir of both their bodies: on the decease of the survivor, the law, therefore, in order to conform as nearly as possible to the manifest intent, that the heir of the body of each of them should inherit, is obliged to sever the tenancy and divide the inheritance between the heir of the body of A., and the heir of the body of B. Each heir will accordingly be entitled to a moiety of the rents and profits, as tenant in tail of such moiety. The heirs will now hold in a manner denominated tenancy in common; instead of both having the whole, each will have an undivided half, and no further right of survivorship will remain (*d*).

Joint tenant in fee.

An estate in fee simple may also be given to two or more persons as joint tenants. The unity of this kind of tenure is remarkably shown by the words which are made use of to create a joint tenancy in fee simple.

(*d*) Litt. s. 283. See *Re Tiverton Market Act*, 20 Beav. 374.

The lands intended to be given to joint tenants in fee simple are limited to them *and their heirs*, or to them, *their heirs and assigns* (*e*), although the heirs of one of them only will succeed to the inheritance, provided the joint tenancy be allowed to continue: thus, if lands be given to A. B. and C. *and their heirs*, A., B. and C. will together be regarded as one person; and, when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The survivor of the three, who together compose the tenant, will, after the decease of his companions, become entitled to the whole lands (*f*). While they all lived each had the whole; when any die, the survivor or survivors can have no more. The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died (*g*). A joint tenancy in fee simple is far more usual than a joint tenancy for life or in tail. Its principal use in practice is for the purpose of vesting estates in trustees, who, as we shall see, are persons entrusted with the legal ownership of lands for the benefit of others (*h*). Such persons are invariably made joint tenants. On the decease of one of them, the whole estate then vests at once in the survivors or survivor of them, without devolving on the heir at law of the deceased trustee, and without being affected by any disposition which he may have made by his will; for joint tenants are incapable of devising their respective shares by will (*i*); they are not regarded as having any separate interests, except as between or amongst themselves, whilst two or more of them are living. Trustees, therefore, whose only interest is that of the persons for

Trustees are always made joint tenants.

(*e*) Bac. Abr. tit. Joint Tenants (A); Co. Litt. 184 a.

(*f*) Litt. s. 280. Any joint tenant taking a beneficial interest by survivorship is now liable to succession duty and estate duty: stats. 16 & 17 Vict. c. 51, s. 3; 57 & 58 Vict. c. 30, ss. 1, 2; see the end of ch. x.

(*g*) Litt. *ubi sup.*

(*h*) See *post*, ch. vii.

(*i*) Litt. s. 287; Perk. s. 500.

whom they hold in trust, are properly made joint tenants. As a rule, the survivor of several joint tenants in fee simple may devise the land, as well as allow it to descend to his heir. But, if such survivor be a trustee of the land, on his death after the year 1881, his estate will vest in his personal representatives, notwithstanding any testamentary disposition he may make (*k*). The Land Transfer Act, 1897 (*l*) does not affect the right of a joint tenant surviving his companions to succeed to the whole estate given to the joint tenants in the lands. But when the whole estate has become vested by survivorship in the longest liver of them, it will devolve upon his death according to the provisions of the Act, and will therefore vest in the first instance in his executors or administrator. If, however, he were entitled for his own use and not as trustee for others, his heir or devisee will have the same beneficial interest in the lands, and the same right to require them to be conveyed to him, as if the whole estate had been originally granted to the last surviving joint tenant alone (*m*).

As joint tenants together compose but one owner, it follows, as we have already observed, that the estate of each must arise at the same time (*n*); so that if A. and B. are to be joint tenants of lands, A. cannot take his share first, and then B. come in after him. To this rule, however, an exception has been made in favour of conveyances taking effect by virtue of the Statute of Uses, to be hereafter explained; for it has been held that joint tenants under this statute may take their shares at different times (*o*); and the exception appears also to

Exception to unity of time.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*l*) Stat. 60 & 61 Vict. c. 65, Part I., *ante*, pp. 29, 57, 74, 84, 85, 108, 131.

(*m*) *Ante*, p. 136.

(*n*) Co. Litt. 188 a; 2 Black. Comm. 181.

(*o*) 13 Rep. 56; Pollexf. 373; Bac. Abr. Joint Tenants (D); Gilb. Uses, 71 (135, n. 10, 3rd ed.).

extend to estates created by will (*p*). A further consequence of the unity of joint tenants is seen in the fact, that if one of them should wish to dispose of his interest in favour of any of his companions, he may not make use of any mode of disposition operating merely as a conveyance of lands from one stranger to another. The legal possession or seisin of the whole of the lands belongs to each one of the joint tenants of an estate of freehold; no delivery can, therefore, be made to him of that which he already has. The proper form of assurance between joint tenants is, accordingly, a release by deed (*q*), and this release operates rather as an extinguishment of right than as a conveyance; for the whole estate is already supposed to be vested in each joint tenant, as well as his own proportion. And in the Norman-French, with which our law abounds, two persons holding land in joint tenancy are said to be seised *per mie et per tout* (*r*).

A release is the proper form of assurance between joint tenants.

The incidents of a joint tenancy, above referred to, last only so long as the joint tenancy exists. It is in the power of any one of the joint tenants to *sever* the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy (*s*). Thus, if there be three joint tenants of lands in fee simple, any one of them may, by any of the usual modes of alienation, dispose during his lifetime, though not by will, of an equal undivided third part of the whole inheritance. But should he die without having made such disposition, each one of the remaining two will have

A joint tenancy may be severed.

(*p*) 2 Jarm. Wills. 1118, 1119, 5th ed.; *Oates* d. *Hatterly* v. *Jackson*, 2 Str. 1172; Fearne, C. R. 313; *Bridge* v. *Yates*, 12 Sim. 645; *Kenworthy* v. *Ward*, 11 Hare, 196; *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 73.

(*q*) Co. Litt. 169 a; Bac. Abr. Joint Tenants (I) 2. 3; 2 Prest. Abst. 61. But a grant would operate as a release; *Chester* v. *Willan*, 2 Wms. Saund. 96 a.

(*r*) Litt. s. 288.

(*s*) Co. Litt. 186 a; *Caldwell* v. *Fellowes*, L. R. 9 Eq. 410.

a similar right in his lifetime to dispose of an undivided moiety of the whole. From the moment of severance, the unity of interest and title is destroyed, and nothing is left but the unity of possession; the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common. Thus, if there be three joint tenants, and any one of them should exercise his power of disposition in favour of a stranger, such stranger will then hold one undivided third part of the lands, as tenant in common with the remaining two.

Tenants in common.

Tenants in common are such as have a unity of possession, but a distinct and several title to their shares (*t*). The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

When the rights of parties are distinct, that is, for instance, when they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property. Of the two a tenancy in common is no doubt preferable, inasmuch as a certain possession of a given

(*t*) Litt. s. 292 : 2 Black. Comm. 191.

share is preferable to a similar chance of getting or losing the whole, according as the tenant may or may not survive his companions. But the enjoyment of lands in *severalty*, or as a single owner, is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant or tenant in common to compel his companions to effect a *partition* between themselves, according to the value of their shares. This partition was formerly enforced by a writ of partition, granted by virtue of statutes passed in the reign of Henry VIII. (*u*). Before this reign, as joint tenants and tenants in common always become such by their own act and agreement, they were without any remedy, unless they all agreed to the partition. In modern times it was found more convenient to resort to the jurisdiction, which the Court of Chancery had acquired, to compel the partition of estates (*x*); and in 1833 (*y*) the old writ of partition, which had already become obsolete, was abolished. Since 1875, this jurisdiction has been exercisable in the Chancery Division of the High Court of Justice (*z*). Whether the partition be effected through the agency of the Court, or by the mere private agreement of the parties, mutual conveyances of their respective undivided shares must be made, in order to carry the partition into complete effect (*a*). With respect to joint tenants, these conveyances ought, as we have seen, to be in the form of releases; but tenants in common, having separate titles,

Partition by writ.

Partition by Court of Chancery.

By High Court of Justice.

(*u*) 31 Hen. VIII. c. 1; 32 Hen. VIII. c. 32.

(*x*) See *Manners* v. *Charlesworth*, 1 My. & K. 330; Select Cases in Chancery, Selden Society, vol. x. 129—131.

(*y*) Stat. 3 & 4 Will. IV. c. 27, s. 36.

(*z*) Stats. 36 & 37 Vict. c. 66, ss. 16, 17, 34; 37 & 38 Vict. c. 83. See *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508.

(*a*) *Attorney-General* v. *Hamilton*, 1 Madd. 214. If any of the parties entitled should be infants or lunatics, and so unable to execute a conveyance, an order may be made vesting their shares in such persons as shall be directed: stat. 56 & 57 Vict. c. 53, ss. 26 (ii), 31 (replacing 13 & 14 Vict. c. 60, ss. 7, 30; 53 Vict. c. 5, s. 135).

must make mutual conveyances, as between strangers; and by a modern statute it is provided, that a partition shall be void at law, unless made by deed (*b*). By the Settled Land Act, 1882 (*c*), the tenant for life under a settlement of an undivided share of land is empowered to concur in making partition of the entirety, and to convey the land given on partition for all the estate, which is the subject of the settlement, in the manner requisite for giving effect to the partition. Another very convenient mode of effecting a partition is, by application to the Board of Agriculture, who are empowered by the Inclosure Acts to make orders for the partition and exchange of lands and other hereditaments, which orders are effectual without any further conveyance or release (*d*).

Partition by Board of Agriculture.

The jurisdiction of the Court of Chancery with regard to partition (now exercisable, as we have seen, in the Chancery Division) was extended by the Partition Act, 1868 (*e*). By this Act the Court is empowered to direct a sale of the property instead of a partition, whenever a sale and distribution of the proceeds appears to the Court to be more beneficial to the parties interested (*f*). If the parties interested to the extent of a moiety or upwards request a sale, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property

Partition Act, 1868.

(*b*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*c*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20.

(*d*) These powers were first given to the Inclosure Commissioners (in 1882 styled the Land Commissioners), and were transferred to the Board of Agriculture in 1889. See stats. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9, 10, 11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 31, ss. 1—11; 21 & 22 Vict. c. 53; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2.

(*e*) Stat. 31 & 32 Vict. c. 40, amended by 39 & 40 Vict. c. 17. Sect. 12 of the former Act gave jurisdiction to the County Courts in suits for partition of property not above £500 in value.

(*f*) Stat. 31 & 32 Vict. c. 40, s. 3.

accordingly (*g*). And if any party interested requests a sale the Court *may*, if it thinks fit, unless the other parties interested or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property (*h*). This alteration of the law, which was some time since suggested by the late author (*i*), has effected a substantial improvement.

(*g*) Sect. 4; *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14; *Porter* v. *Lopes*, 7 Ch. D. 358.

(*h*) Sect. 5; see *Williams* v. *Games*, L. R. 10 Ch. 204; *Pitt* v. *Jones*, 5 App. Cas. 651; *Richardson* v. *Feary*, 39 Ch. D. 45.

(*i*) Essay on Real Assets, p. 129.

CHAPTER VI.

OF THE CONVEYANCE OF A FREEHOLDING AT COMMON LAW.

Let us now turn our attention to the means of conveying a freehold (*a*) of land—what the law requires to effect a valid transfer from one person to another of an estate of freehold (*b*). This has always been and still is a formal matter; mere expression of intention will not suffice to transfer freehold property at law, unless the requisite forms be duly observed (*c*). These forms are not the same now as they were in earlier times. By the common law delivery of possession was principally necessary to effect the conveyance of a freehold: while at the present day the chief requisite is a deed (*d*). But no one can hope to exercise the modern conveyancing art with understanding, without some knowledge of the early law. For the whole modern law of real property is nothing but a tangle of heterogeneous devices for escaping the effect of the common law rules regarding land. And it will yield up its reason to no one, who lacks the patience to learn its history. I would therefore entreat the student to lay aside the notion, that the study of what is obsolete in practice must necessarily be waste of time, and will beg him again to consider with me the law of bygone days.

Feoffment with livery of seisin.

By the common law a freeholding of land was chiefly transferable by *feoffment* with *livery of seisin*; that is,

(*a*) *Ante*, p. 16.
(*b*) *Ante*, p. 63.
(*c*) Bract. fo. 39 b; Litt. ss. 59, 66, 70; *Ward* v. *Audland*, 8 Beav. 201, 212; *Woodford* v. *Charnley*, 28 Beav. 96.
(*d*) Stat. 8 & 9 Vict. c. 106, ss. 2, 3.

by the gift of a freehold estate in the land, coupled with formal delivery of possession. Feoffment is properly the gift of a *fief* or *fee* (*e*); such as was usually conferred in the days of subinfeudation (*f*): but the word came to be applied to the gift of any freehold estate (*g*). Seisin, as we have seen, originally meant any kind of possession, but was not afterwards used to denote any but freehold possession—the possession recoverable in real or mixed actions (*h*). At common law a feoffment need not have been put into writing; it was sufficient to express the gift by word of mouth (*i*); but formal livery of seisin was absolutely necessary to perfect the gift (*k*). This was of two kinds: livery in deed and livery in law.

Livery in deed.

Livery in deed was performed *on* the land to be conveyed by the person making the feoffment (called the *feoffor*) expressing by appropriate act (*l*) and words, or words alone, his intention to deliver seisin of the land to the *feoffee*, or person to be enfeoffed, and yielding up vacant possession thereof accordingly (*m*). And it was requisite, in order to secure the delivery of vacant possession to the feoffee, that all persons who had any estate or possession in the land, of which seisin was delivered, should either join in or consent to making the livery, or be absent from the premises (*n*). If a feoffment were made of different lands lying scattered in the same county (as was usually the case in the days of common fields (*o*)), livery of seisin of any parcel in the name of the rest was sufficient for all, if all were in the complete possession of the same feoffor; but if they were in

(*e*) *Ante*, p. 19.

(*f*) *Ante*, p. 38.

(*g*) Litt. s. 57; Co. Litt. 9 a; P. & M. Hist. Eng. Law, ii. 82.

(*h*) *Ante*, p. 36.

(*i*) Bract. fo. 33 b; Litt. ss. 214—217.

(*k*) Glanv. vii. 1; Bract. fo. 38. 39 b; Litt. ss. 59. 60, 66. Mere entry by a feoffee was insufficient; Litt. s. 70.

(*l*) Such as the delivery of the hasp of the door, or a twig, or a turf.

(*m*) Bract. fo. 39 b *et seq.*; Co. Litt. 48 a, 49 b.

(*n*) Bract. fo. 39 b, 40 b, 41 b, 42. 49, 50; Shep. Touch. 213; *Doe* d. *Reed* v. *Taylor*, 5 B. & Ad. 575.

(*o*) *Ante*, p. 41; see Bract. fo. 40 a, 42 b.

several counties, there must have been as many liveries as there were counties (*p*). For if the title to these lands should come to be disputed, there must have been as many trials as there were counties; and the jury of one county are not considered judges of the notoriety of a fact in another (*q*). Livery in *law* was made, not *on* the land, but *in sight of it* only, by the feoffor telling the feoffee to enter and take possession. If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but if either the feoffor or feoffee died before entry, the livery was void (*r*). This livery was good, although the land lay in another county (*s*); but it required always to be made between the parties themselves, and could not be deputed to an attorney, as might livery in deed (*t*). The word *give* was the apt and technical term to be employed in a feoffment (*u*); its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed.

Livery in law.

The word *give* to be used.

Besides livery of seisin, it was necessary, whether a feoffment were made with or without writing, that the estate to be taken by the feoffee should be marked out, or *limited*, as it is called; that is, that the extent of the feoffee's interest should be ascertained by the proper technical words. Thus, if it were intended to convey an estate of inheritance to the feoffee, it was essential that the gift should be made to him and his *heirs*, or to him and the *heirs of his body*, according as it were desired to limit an estate in fee simple or fee tail (*x*). In the latter case words of procreation, such as "of his

The estate taken must be marked out or limited.

(*p*) Litt. s. 61. But a manor, the site of which extended into two counties, appears to have been an exception to this rule; for it was but as one thing for the purpose of a feoffment; Perkins, sect. 227. See, however, Hale's MS., Co. Litt. 50 a, n. (2).

(*q*) Co. Litt. 50 a; 2 Black. Comm. 315.

(*r*) Co. Litt. 48 b: 2 Black. Comm. 316.

(*s*) Co. Litt. 48 b.

(*t*) Co. Litt. 52 b.

(*u*) Co. Litt. 9 a; 2 Black. Comm. 310.

(*x*) Litt. s. 1.

body," were necessary, as well as the words of inheritance (*heirs*); for a gift to a man and his heirs *male* conferred on him an estate in fee simple and not in tail, there being no words to ascertain the body out of which such heir should issue; and an estate in lands descendible to collateral male heirs only, in entire exclusion of females, is unknown to the English law (*y*). If the land were given to the feoffee simply, without further words, we have seen that he would take an estate for his life only (*z*). And the same result would follow if it were attempted to confer on him a larger estate without using the proper technical words. Thus, if lands were given to a man to have and to hold *to him for ever* or to him *and his assigns* for ever, he had but an estate for life for want of the word *heirs* (*a*). For the same reason a gift to a man *and his seed*, or to him *and his offspring*, or to him *and the issue of his body*, would only confer upon him a life estate and not an estate tail (*b*). This necessity of using the word *heirs* to mark out or limit an estate in fee seems to have been derived from the times before the alienation of land was freely permitted, when the tenant's heir was the only person who could succeed to his estate (*c*). As we have seen, a gift of land would then confer no fee, unless an intention were expressed that the donee's heir should succeed him (*d*). And though tenants in fee simple were afterwards enabled to dispose of their lands so as to defeat the expectation of their heirs, the liberty so gained was treated as incident to their estates (*e*). So that what remained essential, on the gift of a fee simple, was to use apt words to confer an *hereditary* estate, to which the law would annex the power of alienation. But it was not

(*y*) Litt. s. 31; Co. Litt. 20 b, 27; 2 Black. Comm. 114, 115; *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497.
(*z*) *Ante*, p. 110.
(*a*) Litt. s. 1.
(*b*) Co. Litt. 20; 2 Black. Comm. 115.
(*c*) *Ante*, pp. 19, 23, 65—75.
(*d*) *Ante*, p. 111.
(*e*) *Ante*, pp. 67—69.

necessary, after the statute of *Quia Emptores*, expressly to confer an *assignable* estate (*f*). And though in later times it became a common form to convey land to a purchaser, to hold to him *his heirs and assigns for ever* (*g*), yet the word *heirs* alone gave him a fee simple, of which the law enabled him to dispose; and the remaining words *and assigns for ever* had no conveyancing virtue at all; but were merely declaratory of that power of alienation which the purchaser would have possessed without them.

A feoffment might have created an estate by wrong.

The delivery of possession which always took place in a feoffment, rendered it an assurance of great power; for the law permits one who has obtained actual possession of land, to maintain it against all others, except those who may lawfully claim the land under a prior title (*h*). If, therefore, a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated (as it was said) *by wrong*. That is to say, it would have conferred on the feoffee the whole estate limited by the feoffment, and would have enabled him to maintain the seisin actually delivered to him against all, but those whose prior title was displaced by the feoffment. And even they were in certain cases deprived of all right to enter upon the land, and left with nothing but a right to bring an action for its recovery (*i*). Thus if a tenant in tail or for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee

Feoffment by tenant in tail or for life.

(*f*) *Ante*, p. 72.

(*g*) See 2 Black. Comm. Appx. i. vi.

(*h*) Bract. fo. 30 b, 31; Cole on Ejectment, 287; Williams on Seisin, 7; Holmes on the Common Law, 244; P. & M. Hist. Eng. Law. ii. 40 *sq.*

(*i*) Generally descent to the heir of the actual possessor was required to take away the right of entry. But feoffments by tenants in tail, and one or two others, put the injured parties to their action. See Litt. ss. 385 *sq.*, 415, 592—600; Co. Litt. 239 a, n. (1), 325 a, n. (1), 330 b, n. (1).

simple by wrong (*k*). In the case of a tenant for life, who has no fee and whose position in early times was that of lessee rather than owner (*l*), such a feoffment was held to be a cause of forfeiture to the person next entitled after his death; as being a conveyance of such person's interest to another without his consent (*m*). But a feoffment by tenant in tail conferred an estate indefeasible during his life (*n*). At the present day, however, an estate by wrong can no longer be created by feoffment; an Act of 1845 providing that a feoffment shall not have any tortious operation (*o*).

The Statute of Uses.

A consideration required, or the gift to be made to the use of the feoffee.

Down to the time of King Henry VIII. nothing more was requisite to a valid feoffment than has been already mentioned. In the reign of this king, however, an Act of Parliament of great importance was passed, known by the name of the Statute of Uses (*p*). And after this statute it became further requisite to a feoffment, either that there should be a *consideration* for the gift, or that it should be expressed to be made, not simply *unto*, but *unto and to the use of*, the feoffee. The manner in which this result was brought about by the Statute of Uses will be explained in the next chapter.

Writing formerly unnecessary.

If proper words of gift were used in a feoffment, and witnesses were present who could afterwards prove them, it mattered not, in ancient times, whether or not they were put into writing (*q*); though writing, from its greater certainty, was generally employed (*r*). There was this difference, however, between writing in those

(*k*) Litt. ss. 599, 611; see *ante*, pp. 106. 116.

(*l*) Litt. s. 57: *ante*, p. 112.

(*m*) Litt. ss. 415. 416. 609—611, 621; Co. Litt. 251: see Bract. fo. 31 a, for earlier law. So a feoffment in fee by a tenant for years was a cause of forfeiture: Litt. s. 611: Co. Litt. 233 b, 251 b, 330 b, n. (1).

(*n*) Litt. ss. 595—600, 605—614, 649, 650.

(*o*) Stat. 8 & 9 Vict. c. 106, s. 4.

(*p*) Stat. 27 Hen. VIII. c. 10.

(*q*) Bract. fo. 11 b, 33 b; Co. Litt. 48 b, 121 b. 143 a, 271 b, n. (1).

(*r*) Madox. Form. Angl., Dissert. p. 1.

days, and writing in our own times. In our own times, almost everybody can write; in those days very few of the landed gentry of the country were so learned as to be able to sign their own names (*s*). Accordingly, on every important occasion, when a written document was required, instead of signing their names, they affixed their seals (*t*); and this writing, thus sealed, was delivered to the party for whose benefit it was intended. Writing was not then employed for every trivial purpose, but was a matter of some solemnity. And a charter, or writing whereby a man formally expressed an intention of gift, or bound himself to perform any act, was held to afford conclusive proof of the matter expressed therein, unless it were shown to have been forged, or extorted from him by fraud or force, or like objections to its validity were established (*u*). In very early times after the Norman Conquest, it appears that even an unsealed charter might have this effect (*x*). But afterwards it came to be settled (*y*) that a charter must have affixed to it the seal of the person whose act or promise it recorded, in order to be admitted as conclusive evidence against him (*z*). Thenceforward the conclusive effect which the early law gave to writings was confined to sealed writings. In all legal transactions, therefore, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a *deed*, in Latin *factum*, a thing done: nothing in fact was in early times called a *writing* but a document under seal (*a*).

Charter.

A deed.

(*s*) 3 Hallam's Middle Ages, 329; 2 Black Comm. 305, 306.

(*t*) It appears that the use of seals was introduced into England after the Norman Conquest, and that previously the English custom was to make a mark; see Kemble, Codex Diplomaticus, vol. i. Introd. xc.—ci.; Ducange, Gloss. tit. Sigillum; Bigelow, Placita Anglo-Normannica, 175, 177; Maitland, Domesday Book and Beyond, 261—265.

(*u*) Glanv. x. 12; Bract. fo. 100, 396; Britt. liv. i. ch. 29. §§ 5, 14—22.

(*x*) Bigelow, Pl. Ang.-Norm. 175, 177.

(*y*) Probably as a safeguard against forgery: Holmes on the Common Law, 272.

(*z*) See Y. B. 30 Edw. I. p. 158; Fleta, lib. ii. c. 60. § 25; Britt. liv. i. ch. 29, §§ 17, 19; P. & M. Hist. Eng. Law. ii. 218, 220—222.

(*a*) See the authorities cited

Hence it is that in every transaction, in which *the common law* requires writing, a deed is necessary (*b*).

This rule remained in force after writing had come into common use, and sealing, as a proof of authenticity, had been superseded by the practice of men signing their names in their own handwriting. So that deeds acquired a superiority over other writings; by which a man was in general no more conclusively bound than by spoken words. Thus agreements made by deed have always been enforceable at law merely by reason of their formal character (*c*), and without any exception in the case of a gratuitous promise. But with regard to agreements made without deed (although in writing), it was established that a man should not enforce a promise so made to him, unless he had given some pecuniary or other valuable *consideration* in return for it (*d*). After this doctrine had been broached, the force of a deed in conclusively binding a man who executed it, was erroneously explained by saying that a deed in law imports a consideration (*e*). And this explanation was erected into a rule of law (*f*). So that at the present day a *deed*, or a writing sealed and delivered (*g*), is still said to import a consideration, and maintains in many respects a superiority in law over a mere unsealed writing. In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made, is held to be equivalent to sealing (*h*); and the words, "I deliver this as my act and

Consideration.

in n. (*a*) above; Litt. ss. 217, 250, 252, 365—367; Co. Litt. 35 b; Shep. Touch. 320, 321.

(*b*) Co. Litt. 9, 49 a. 85 a, 121 b, 143 a, 169 a. 172 a; *ante*, p. 31.

(*c*) Y. B. 45 Edw. III. 24, pl. 30.

(*d*) See Pollock on Contracts, ch. iii., iv.; Wms. Pers. Prop. 155. 15th ed.; *Rann* v. *Hughes*, 7 T. R. 350. n.; *ante*, p. 78.

(*e*) Plowd. 308. 309; Bacon on Uses, 310. See Holmes. Common Law. 271—273.

(*f*) 2 Black. Comm. 446; 1 Fonb. Eq. 342, n.; 2 Fonb. Eq. 26.

(*g*) Co. Litt. 171 b; Shep. Touch. 50.

(*h*) Shep. Touch. 57; see *National Provincial Bank* v. *Jackson*, 33 Ch. D. 1.

deed," which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself (*i*). The sealing and delivery of a deed are termed the *execution* of it. Occasionally a deed is delivered to a third person not a party to it, to be delivered up to the other party or parties, upon the performance of a condition, as the payment of money or the like. It is then said to be delivered as an *escrow* or mere writing (*scriptum*); for it is not a perfect deed until delivered up on the performance of the condition: but when so delivered up, it operates from the time of its execution (*k*). Any alteration or rasure in or addition to a deed is presumed to have been made before its execution (*l*). And it was formerly held that any alteration, rasure, or addition made in a material part of a deed, after its execution by the grantor, even though made by a stranger, would render it void; and that any alteration in a deed made by the party to whom it was delivered, though in words not material, would also render it void (*m*). But a more reasonable doctrine has lately prevailed; and it has now been held that the filling in of the date of the deed, or of the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void, even though done by the party to whom it has been delivered, after its execution (*n*). A material alteration inconsistent with the original purpose of a deed still makes it void (*o*).

Execution.

Escrow.

Alteration, rasure, &c.

(*i*) *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671; *Grugeon* v. *Gerrard*, 4 Y. & C. 119, 130; *Exton* v. *Scott*, 6 Sim. 31; *Fletcher* v. *Fletcher*, 4 Hare, 67. See also *Hall* v. *Bainbridge*, 12 Q. B. 699.

(*k*) See Shep. Touch. 58, 59; *Bowker* v. *Burdekin*, 11 M. & W. 128, 147; *Nash* v. *Flyn*, 1 J. & Lat. 162; *Graham* v. *Graham*, 1 Ves. jun. 275; *Millership* v. *Brookes*, 5 H. & N. 797; *Watkins* v. *Nash*, L. R. 20 Eq. 262; *London, &c. Co.* v. *Suffield*, 1897, 2 Ch. 608, 621.

(*l*) *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745.

(*m*) *Pigot's case*, 11 Rep. 27 a.

(*n*) *Adsetts* v. *Hives*, 33 Beav. 55; *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573.

(*o*) *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75; and see *Davidson* v. *Cooper*, 13 M. & W. 343, 352; *Suffell* v. *Bank of*

Deeds poll and indentures.

Deeds are divided into two kinds—*deeds poll* and *indentures*; a deed poll being made by one party only, and an indenture being made between two or more parties. Formerly, when deeds were more concise than at present, it was usual, where a deed was made between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, often in an indented line, so as to leave half the word or letters on one part, and half on the other, thus serving the purpose of a tally. But at length indenting only came into use (*p*); and now every deed, to which there is more than one party, is cut with an indented or waving line at the top, and is called an *indenture* (*q*). Formerly, when a deed assumed the form of an indenture, every person who took any immediate benefit under it was always named as one of the parties (*r*). But it is now enacted that, under an indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also that a deed, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*s*). A deed made by only one party is polled, or shaved even at the top, and is therefore called a *deed poll*; and, under such a

Person taking benefit need not be a party.

Deed poll.

England, 9 Q. B. D. 555, 559, 571. If an estate has once been conveyed by a deed, of course the subsequent alteration, or even the destruction, of the deed cannot operate to reconvey the estate; and the deed, even though cancelled, may be given in evidence to show that the estate was conveyed by it whilst it was valid; *Ward* v. *Lumley*, 5 H. & N. 87, 656. But the deed having become void, no action could be brought upon any covenant contained in it: *Pigot's case*, 11 Rep. 27 a; *Hall* v. *Chandless*, 4 Bing. 123. It is now felony not only to steal, but also for any fraudulent purpose to destroy, cancel, obliterate, or conceal any document of title to lands; stat. 24 & 25 Vict. c. 96, s. 28.

(*p*) 2 Black. Comm. 295.

(*q*) Co. Litt. 143 b.

(*r*) See Co. Litt. 229 a, 231 a; Bacon on Uses, 14.

(*s*) Stat. 8 & 9 Vict. c. 106, s. 5, repealing stat. 7 & 8 Vict. c. 76, s. 11, to the same effect.

deed, any person may accept a grant, though of course none but the party can make one. All deeds must be written either on paper or parchment (*t*).

Writings not under seal.

So manifest are the advantages of putting down in writing matters of any permanent importance, that, as commerce and civilization advanced, writings not under seal must necessarily have come into frequent use; but, until the reign of King Charles II., the use of writing remained perfectly optional with the parties in every case which did not require a deed under seal. In this reign, however, an Act of Parliament was passed (*u*), requiring the use of writing in many transactions, which previously might have taken place by mere word of mouth. This Act is intituled "An Act for Prevention of Frauds and Perjuries," and is now commonly called the Statute of Frauds. It enacts (*x*), amongst other things, that all leases, estates, interests of freehold, or term of years, or any uncertain interests, in lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and no greater force and effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding. The only exception to this sweeping enactment is in favour of leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved to the landlord (*y*). In consequence of this Act, it became necessary that a

The Statute of Frauds.

An exception.

(*t*) Shep. Touch. 54 : 2 Black. Comm. 297. *Deeds not specially charged with an *ad valorem* or other stamp duty are now subject to a stamp duty of 10*s.* Stat. 54 & 55 Vict. c. 39, s. 1 and 1st schedule, replacing stat. 33 & 34 Vict. c. 97.

(*u*) Stat. 29 Car. II. c. 3.

(*x*) Sect. 1.

(*y*) Sect. 2.

* Stamps on deeds.

feoffment should be put into writing, and signed by the party making the same, or his agent lawfully authorized by writing; but a deed or writing *under seal* was not essential (*z*), if livery of seisin were duly made. But now by the Real Property Act, 1845 (*a*), a feoffment, other than a feoffment made under a custom by an infant (*b*), shall be void at law, unless evidenced by deed. Where a deed is made use of, it is a matter of doubt, whether signing, as well as sealing, is absolutely necessary: previously to the Statute of Frauds, signing was not at all essential to a deed, provided it was only sealed and delivered (*c*); and the Statute of Frauds seems to be aimed at transactions by parol only, and not to be intended to affect deeds. Of this opinion is Mr. Preston (*d*). Sir William Blackstone, on the other hand, thinks signing now to be as necessary as sealing (*e*). And the Court of Queen's Bench has, if possible, added to the doubt (*f*). Mr. Preston's, however, appears to be the better opinion (*g*). However this may be, it would certainly be most unwise to raise the question by leaving any deed sealed and delivered, but not signed.

A deed now necessary.

Whether signing of deeds necessary.

Legal doubts.

The doubt above mentioned is just of a class with many others, with which the student must expect to meet. Lying just by the side of the common highway of legal knowledge, it yet remains uncertain ground. The abundance of principles and the variety of illustrations to be found in legal text-books, are apt to mislead the student into the supposition that he has obtained a map of the whole country which lies before

(*z*) 3 Prest. Abst. 110.
(*a*) Stat. 8 & 9 Vict. c. 106, s. 3.
(*b*) *Ante*, p. 59.
(*c*) Shep. Touch. 56.
(*d*) Shep. Touch. 56, n. (24). Preston's ed.; 3 Prest. Abst. 61.
(*e*) 2 Black. Comm. 306.
(*f*) *Cooch* v. *Goodman*, 2 Q. B. 580, 597.
(*g*) See *Taunton* v. *Pepler*, 6 Madd. 166, 167; *Aveline* v. *Whisson*, 4 Man. & Gr. 801; *Cherry* v. *Heming*, 4 Ex. 631, 636; *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19. 27; Sug. Pow. 234, 235.

him. But further research will inform him that this opinion is erroneous, and that, though the ordinary paths are well beaten by author after author again going over the same ground, yet much that lies to the right hand and to the left still continues unexplored, or known only as doubtful and dangerous. The manner in which our laws are formed is the chief reason for this prevalence of uncertainty. Parliament, the great framer of the laws, seldom undertakes the task of interpreting them, a task indeed which would itself be less onerous, were more care and pains bestowed on the making of them. But, as it is, a doubt is left to stand for years, till the cause of some unlucky suitor raises the point before one of the Courts; till this happens, the judges themselves have no authority to remove it; and thus it remains a pest to society, till caught in the act of raising a lawsuit. No wonder then, when judges can do little, that writers should avoid all doubtful points. Cases, which have been decided, are continually cited to illustrate the principles on which the decisions have proceeded: but in the absence of decision, a lawyer becomes timid, and seldom ventures to draw an inference, lest he should be charged with introducing a doubt.

Means of conveyance at common law, without livery of seisin.

To return:—Besides a feoffment, there were certain means by which an estate of freehold could be conveyed at common law, without livery of seisin; but none of these were available without actual entry upon the land (*h*).

Fines and recoveries.

Thus fines and recoveries, which have been already explained (*i*), were considered in the light of common assurances of freeholds. But these owed their

(*h*) A gift of land by or to the King, which ought at common law to be made, in the former case, by the royal letters patent, and in the latter, by deed enrolled or other matter of record, took effect without livery of seisin; see Plowd. 213: 2 Black. Comm. 346: Vin. Abr. Prerogative (2 c. A. d, B. d).

(*i*) *Ante*, pp. 96—99.

force and effect to their being judicial proceedings. A fine, too, either presupposed seisin of the lands by the person to whom it was levied, or required to be followed up by entry on his part (*k*). And recoveries used to be completed by a regular writ directing the sheriff to put the recoveror in possession of the lands (*l*). So that in each case a transfer of possession was contemplated as notorious as that made by livery of seisin (*m*). Again, if a freeholder in fee let his land to a tenant for years or at will, who entered into actual possession, only the mere right (*n*) of freehold and fee remained with the former; and this, being an incorporeal hereditament, was transferable at common law by deed (*o*). In such a case, therefore, a freehold estate could be conveyed to the tenant by deed of *release* to him of all his landlord's estate in the land. But no such release could be effectually made to a tenant, who had not actually entered (*p*). For the same reason an estate of freehold might be conveyed from a rightful owner to any one, who had obtained actual possession of his land, either with or without his privity, by deed of *confirmation* of the estate to him (*q*). Also, if two men of equal estate (*i.e.*, both seised in fee or tail) agreed to *exchange* lands, this might be completed at common law by entry without formal livery of seisin (*r*). And a life-tenant in possession might *surrender* or give up his estate to a person entitled immediately after his death to the freehold in fee without making formal livery (*s*).

Lease and release.

Confirmation.

Exchange.

Surrender.

(*k*) Co. Tr. 229, 230, 243, 261; Shep. Touch. 3, 4; 2 Black. Comm. 348—357; Cruise on Fines, ch. iii.

(*l*) Cruise on Recoveries, 151.

(*m*) See Cruise on Fines, 3, 6, 62, 63, 65, 158.

(*n*) *Ante*, pp. 5, 30.

(*o*) *Ante*, p. 31.

(*p*) Bract. fo. 40 a; Litt. ss. 459, 460, 465.

(*q*) Bract. fo. 40 b; Litt. ss. 515—591, 531—533.

(*r*) Litt. ss. 62—65; Co. Litt. 50, 51, 266 b.

(*s*) Co. Litt. 337 b, 338 a; 2 Black. Comm. 326. At common law an exchange of lands in the same county or a surrender of a freehold estate might well have been made by word of mouth: though an exchange of lands in different counties required a deed. But the Statute of Frauds provided that no leases, estates, or interests in any lands (not

No means of conveyance at common law without entry.

We see then that every mode of conveying a freehold known to the common law either required or presupposed a transfer of possession; and that no one could acquire an estate of freehold without entry on the land. In later times a method of conveyance was devised, which could be made use of at any distance from the property: but this derived its effect from the Statute of Uses (*t*). Before proceeding further, therefore, it will be necessary to explain that statute, and what it was designed to abolish, namely, equitable estates in land.

being copyhold or customary interests) should be granted, assigned, or surrendered unless by deed, or note in writing signed as required by the Act in the case of a feoffment, or by act and operation of law. By the Real Property Act, 1845, a deed is requisite to make an exchange or a surrender *in writing* of a freehold estate valid in law. But if, by agreement between a tenant for life and one entitled immediately after him in fee, the former give up and the latter take *possession* of the land, it seems that this would be considered to be a surrender of the life estate by operation of law, and therefore good without deed or writing. See stats. 29 Car. II. c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3; *Lyon* v. *Reed*, 13 M. & W. 285, 305—310; *Dodd* v. *Acklom*, 6 M. & G. 672, 679; *Phene* v. *Popplewell*, 12 C. B., N. S., 334; *Oastler* v. *Henderson*, 2 Q. B. D. 575; *Fenner* v. *Blake*, 1900, 1 Q. B. 426.

(*t*) Stat. 27 Hen. VIII. c. 10.

CHAPTER VII.

OF AN EQUITABLE ESTATE IN LAND.

Section I.

Of Equity and the Court of Chancery.

Equity.

Besides the freehold estates in land, which may be enjoyed by the common law (*a*), a man may have valuable interests in land to which he is entitled, not at *law*, but in *equity* only. This word *equity*, when used, as here, in contra-distinction to law, does not refer to what is morally right as opposed to what is legal, but denotes generally the body of rules which has been developed in the exercise of the equitable jurisdiction of the Court of Chancery (*b*). These rules of equity are as much rules of positive law (*c*) as are the rules of common law; each body of rules is a part of the law of the land. The rules of equity, however, are of later origin. Like the equity of the Prætor in the Roman system (*d*), they were introduced to mitigate the harshness of a rigid legal system. In this country, however, they were not enforced in the same courts as the rules of law, but were administered in separate tribunals, the chief of which was the Court of Chancery. This Court gradually acquired complete power of carrying out its

(*a*) *Ante*, p. 9, n.

(*b*) Cf. Story, Eq. Jur. ch. i. §§ 25 *sq.*

(*c*) *I.e.*, rules enforced by a sovereign political authority: see Holland, Jurisprudence, 36, 37, 3rd ed.

(*d*) As to which see Gai. Comm. I. §§ 2, 6; Dig. I. i. 7; De Justitia et Jure; Maine's Ancient Law, ch. iii.; Moyle's Justinian, 27 *sq.*

own decrees, even when they over-rode the rules of the common law: though the means adopted to secure obedience were not the same as were used to give effect to the judgments of common law courts. But, notwithstanding this difference in procedure, the rules of equity established in the Chancery Court became as binding on the subject, and as enforceable by the executive power of the State, as the rules of common law.

Origin of the equitable jurisdiction exercised in Chancery.

The jurisdiction of the Court of Chancery, like that of the common law courts (*e*), was derived from the authority of the King, regarded as the source of all justice within the realm. When Henry II. delegated his ordinary legal jurisdiction to judges sitting permanently (*f*), he reserved questions, which they could not determine, for the decision of himself and his council (*g*). To the King, therefore, and to his select council (*h*) petitions were constantly made for the redress of every kind of injustice, and especially for relief, as a matter of special grace and favour, in cases wherein no remedy could be had by the ordinary law (*i*). About the twenty-second year of Edward III. petitions touching matters to be conceded of the royal grace were ordered to be prosecuted before the Chancellor: and it appears that after this petitions for the redress of grievances which the common law failed to remedy, began to be addressed to the Chancellor instead of the King (*k*). After a statute of the 17th year of Richard II. (*l*) extending the Chancellor's jurisdiction, such petitions were regularly filed (*m*). Chancery process formed the

A.D. 1348–9.

(*e*) *Ante*, p. 9. n. (*e*)

(*f*) *Ante*, p. 9. n. (*e*).

(*g*) Benedict, Gesta Hen. II. i. 207: Stubbs, Const. Hist. ch. xii, § 163.

(*h*) As to which, see Stubbs, Const. Hist. ch. xv. § 230: Hardy, Introd. to Close Rolls, xxvi.

(*i*) See Stubbs, Const. Hist. ch. xv. § 231; Hardy, Introd. to Close Rolls, xxviii.

(*k*) Hardy, Introd. to Close Rolls. xxviii., xxix.: and see Baildon, Select Cases in Chancery: Selden Society, vol. x., Introd. xv. *sq.*

(*l*) Stat. 17 Ric. II. 6.

(*m*) 1 Cal. Preface.

subject of complaint by the Commons in the next three reigns (*n*); but in Edward the Fourth's time it is found established as a thing of use and wont (*o*). The equitable jurisdiction of the Court of Chancery was finally established by the decision in its favour by James I. of the controversy, whether a court of equity could give relief after or against a judgment of a court of common law (*p*).

Chancery process.

Chancery process was directed against the person complained of, who was summoned to appear and answer the matters laid to his charge (*q*); and, if need were, enjoined to refrain from exercising his common-law rights in a manner contrary to what the Court enforced as equity (*r*). Contempt of the Court's decree was punished by attachment (*s*) and imprisonment of the party in contempt, and in later times by sequestration (*t*) of his property. But it was only in Chancery that the rules of equity were enforced; for a title to relief in equity was never admitted to confer a *right* cognizable by the courts of common law (*u*). Chancery procedure

Chancery procedure.

(*n*) See Rot. Parl. iii. 471, 506, 510; iv. 84, 156, 189, 501; Selden Society, vol. x., Introd. xvii.

(*o*) Hardy. Introd. to Close Rolls, xxxi.; Rot. Parl. vi. 144.

(*p*) See 3 Black. Comm. 52; Cary, 163; Jurisdiction of the Court of Chancery vindicated, at the end of 1 Ch. Rep.

(*q*) See Hardy, Introd. to Close Rolls, xxx., note (3); Rot. Parl. iv. 84; Palgrave on the King's Council, 41; 1 Cal. v., xxvii.; Selden Society, vol. x., Introd. xiv., xxiv. *sq.*, 3, 8, 13, 17, 18.

(*r*) Spence, Eq. Jur. 371, 673—676.

(*s*) *Clay* v. *Aldeburgh*, 2 Cal. lxii. (14 & 15 Edw. IV.).

(*t*) Sequestration appears to have been introduced in Elizabeth's reign, but hardly became an established institution before the time of Charles II. See Practice of the High Court of Chancery (A.D. 1672), 25, 26; 1 Vern. 421; 1 Eq. Ca. Abr. 130; Prec. Ch. 552; Tothill, *Sequestration*; *Brograve* v. *Watts*, Cro. Eliz. 651; 1 Ch. Rep. 81; 1 Ch. Ca. 91; 2 Ch. Ca. 44, 45; Praxis Almæ Curiæ Cancellariæ (A.D. 1694), 32, 44, 89; Gilbert, Forum Romanum, 18, 68 *sq.*; *ante*, p. 26, n. (*r*).

(*u*) See Y. B. 4 Edw. IV. 8, pl. 9; *Warwick* v. *Richardson*, 10 M. & W. 284; *Carvalho* v. *Burn*, 4 B. & Ad. 382, 396; *Burn* v. *Carvalho*, 4 My. & Cr. 690, 699; Lewin on Trusts, 16, 6th ed., 15, 10th ed. A limited equitable jurisdiction was, however, conferred on the Common Law Courts by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 68, 69, 79, 83, 85).

was borrowed from the Canon Law (*x*); and presented a strong contrast to common law procedure in its mode of trial by a single judge without a jury (*y*), its manner of taking evidence by the written depositions of witnesses examined by written interrogatories (*z*), and its decrees requiring the specific performance of the acts enjoined (*a*).

Principle of equitable relief.

It does not appear that in the first days of Chancery process relief was afforded on principles not recognized in the courts of law (*b*). On the contrary, the earliest petitions to the Chancellor were generally from those who had suffered wrongs cognizable at common law, but were hindered from pursuing their legal remedies by extraneous causes, such as the oppression of great men or the corruption or partiality of the King's officers (*c*). The great value of Chancery procedure to aggrieved parties was that the defendant was interrogated and compelled to answer on oath as to the matters in dispute, and was thus obliged to make discovery of facts which might otherwise have remained undetected (*d*); also that he might be enjoined to do, or refrain from a particular act, instead of being adjudged to pay money. For these reasons application

(*x*) Gilbert, Forum Roman., ch. ii., iii.; L. Q. R. i. 162.

(*y*) 1 Spence, Eq. Jur. 383; 3 Black. Comm. 442, 450.

(*z*) 3 Black. Comm. 438, 449; 2 Maddock, Chancery Practice. 569, 3rd ed. Since 1852 evidence in Chancery proceedings may be taken *viva voce*; see stat. 15 & 16 Vict. c. 86, ss. 28—30; R. S. C. 1883, Order xxxvii. r. 1.

(*a*) 1 Spence, Eq. Jur. 389, 390. Judgments at common law were, generally, either for the recovery of land, or of a sum of money, simply.

(*b*) See L. Q. R. i. 163 & n. (1). The complaints of the Commons already mentioned (*ante*, p. 160) were directed against the issue of Chancery process in matters triable at common law.

(*c*) See 1 Cal. Preface, iii., v.—ix., xiii., xxxi.—xxxiii., xlii., lxxxviii., ci., cxviii., cxxviii. 2 Cal. i., v., viii., xxix., xxxii.—xxxv., lxix.: Fitz. Abr. Subpœna, 20; Selden Society, vol. x., Introd. xliv. With the better administration of the law consequent upon the growth of modern society the Chancery jurisdiction over such matters became obsolete, and it has no place in modern equity; 1 Spence, Eq. Jur. 687, 689.

(*d*) Selden Society, vol. x., Introd. xxvii. Discovery became an important head of equity jurisdiction; see Haynes' Outlines of Equity. Lect. vi.

was also made to the Chancellor, and a jurisdiction established in some matters where there was good right to relief, but inadequate remedy at the common law (*e*). But it was only by slow degrees that there grew up a jurisdiction in Chancery to grant relief in certain cases of hardship in which the common law would admit no cause of action at all (*f*). The first exercise of this jurisdiction must of course have been based on considerations of morality and expediency (*g*). The Chancellor, originally an ecclesiastic, was called the keeper of the King's conscience (*h*) : relief was prayed of him in the name of good faith, reason and conscience (*i*) ; equity was then identified with the rule of action prescribed by good conscience (*k*) ; and for some time it was left to the Chancellor's discretion how far he would interfere (*l*). But the respect paid to precedent

(*e*) An example of this occurs in the case of fraud, recourse being had to Chancery not only to obtain discovery of fraudulent dealing, but also to compel the delivery up and cancellation of deeds and instruments which had been forged or procured to be executed by fraud, duress or undue influence ; see 1 Cal. xi., xlv., li., cxxix., cxxxi. : 2 Cal. xii., xv., xxx. ; Selden Society, vol. x., Introd. xxxi.—xxxiii. Decreeing the specific performance of certain contracts, chiefly for the sale or leasing of land, is another (and apparently later) instance ; Selden Society, vol. x., Introd. xxxv. ; Fry, Specific Performance, 15, 3rd ed. And see Haynes' Outlines of Equity, Lect. v.

(*f*) The most important instances of the exercise of this jurisdiction are, in early times, the issue of Chancery process in case of a breach of trust, and, in later equity, the granting of relief against forfeiture for non-payment of money by a certain day, whence sprung the equity of redemption of mortgages forfeited at law. See *post*, pp. 167, 177, and part iv., ch. ii. ; Haynes' Outlines of Equity, Lect. iv. As to certain cases of the intermediate time, see 1 Cal. xx., xciii. : 2 Cal. ii., lxiii. ; Y. B. 22 Edw. IV. 6, pl. 18 ; Hargrave, Law Tracts, 334—339 ; L. Q. R. i. 171 ; Harvard Law Review, viii. 254—257.

(*g*) See Harvard Law Review, viii. 257.

(*h*) Hardy, Close Rolls, Introd. xxvii.

(*i*) See 1 Cal. ii., xxi., xxvii., xxxiv. *sq.* : 2 Cal. ii., v., vii., xi. *sq.*

(*k*) See Y. B. 4 Hen. VII. 4, pl. 8 ; Bro. Abr. Conscience, pl. 8, 15, 17 ; Doctor and Student, Dial. I. ch. 12—19 ; Bac. Tr. iv. 305—307, 312, 324. In the Roman system, equity was identified with natural law, or the law which natural reason teaches all mankind ; see Maine's Ancient Law, ch. iii. ; Gai. Comm. I. 1, 156, II. 65—73, III. 25.

(*l*) See Hardy, Introd. to Close Rolls, xxiii., xxxi. ; Lambard's Archeion, 48, 64 ; Abuses and Remedies of Chancery in Har-

and the practice of the Court (*m*), the professional opinion of regular practitioners at the Chancery Bar (*n*), the practice of deciding difficult cases with the advice of the judges (*o*), and the example of the Prætor's equity in Roman law (*p*), were all influences tending to make the Chancellor's interference with the law, in the name of equity, a matter of principle (*q*). Still, it was hardly until after the restoration of Charles II. that it became well understood that relief should be administered in a court of equity upon fixed principles of justice to be ascertained from precedents (*r*). Moreover, the practice of committing the Great Seal to a lawyer was not established before the seventeenth century (*s*). Indeed modern equity, the body of rules now enforced as equity, is generally dated from the Restoration, and may be said to have been evolved from the judgments given in the Court of Chancery from the Chancellorship of Lord Nottingham (*t*) down to that of Lord Eldon (*u*). By that time equity had become a body of case-law, administered on principles to be found in former decisions, but admitting no further accessions from the moral domain. Such it has

grave's Law Tracts, 430, 431; Selden, Table Talk, Equity; 3 Black. Comm. 54, 433, 434.

(*m*) See Ordinacio Cancellariæ, 12 Ric. II.; Renovacio Ordinum Cancellariæ, *temp.* Hen. V., Sanders, Chancery Orders, 1—7 d; Hardy, Introd. to Close Rolls, xxxi.

(*n*) Renov. Ord. Canc., Sanders, Ch. Ord. 7 d.

(*o*) See Y. B. 37 Hen. VI. 13 & 35, pl. 23; 7 Edw. IV. 14, pl. 8; 22 Edw. IV. 6, pl. 18; 1 Cal. xcvii.; 2 Cal. xxviii.

(*p*) Spence, Eq. Jur. i. 412, 415; see Smyth, De Republica Anglorum, 52, 54, ed. 1583; Treatise of the Masters in Chancery, § iv., in Hargrave's Law Tracts, 309—313; History of the Chancery, A.D. 1726, p. 40; Reeves, Hist. Eng. Law, ch. xxii. vol. ii., pp. 600, 601, ed. Finlason.

(*q*) Spence, Eq. Jur. i. 407 *sq.*

(*r*) *Fry* v. *Porter*, 1 Mod. 307.

(*s*) The early Chancellors were mostly ecclesiastics, who, however, were then usually bred up in the study of the civil and canon law: see 3 Black. Comm. 53: Hardy's Catalogue of Chancellors; Reeves, Hist. Eng. Law, ch. xxvi. vol. ii. p. 600, ed. Finlason.

(*t*) A.D. 1673—1682. See 3 Black. Comm. 55; 1 Butler's Reminiscences, § 11; Story, Eq. Jur. § 52.

(*u*) Lord Chancellor, A.D. 1801—1806 & 1807—1827; see Maine's Ancient Law, ch. iii.

since remained, notwithstanding a portentous increase in volume. Chancery procedure, of which the delays had become an intolerable scandal (*x*), was reformed in 1833 (*y*), and again in 1852 (*z*).

Judicature Acts of 1873–75.

In 1875 the old Court of Chancery came to an end. In that year its original jurisdiction was by the Judicature Acts of 1873–75 transferred, together with that of the old courts of common law, to the High Court of Justice then established (*a*). The same Acts made provision for the recognition and enforcement of equitable rights in every branch of that Court, and in the Court of Appeal established at the same time (*b*); and also for the prevalence of the rules of equity, where conflicting with the rules of common law (*c*). For purposes of procedure, however, the administration of the principal matters, in which the Court of Chancery used to exercise its exclusive jurisdiction, and of the same Court's statutory jurisdiction, was assigned to the Chancery Division (*d*). Since 1875, therefore, *law* and *equity* have been administered in the same Court; and injunctions of a court of equity against proceeding at law are things of the past (*e*). The two systems of law and equity have not, however, been abolished, as some have imagined. For it is held that the effect of the Judicature Acts is not to change the nature of equitable as opposed to legal rights, but is to secure by the jurisdiction of one Court the same (but no greater) prevalence of equitable over legal rights as was formerly obtained by the action of the Court of

(*x*) See C. P. Cooper's Lettres sur la Cour de la Chancellerie.

(*y*) By stat. 3 & 4 Will. IV. c. 94; Orders in Chancery, 21st Dec., 1833; 3 L. J. N. S. Ch. 1.

(*z*) By stat. 15 & 16 Vict. c. 86. See First Report of the Chancery Commission, 1852.

(*a*) Stats. 36 & 37 Vict. c. 66, s. 16; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

(*b*) Stat. 36 & 37 Vict. c. 66, s. 24.

(*c*) Sect. 25, sub-s. 11.

(*d*) Stat. 36 & 37 Vict. c. 66, s. 34.

(*e*) See sect. 24, sub-s. 5; *Wright* v. *Redgrave*, 11 Ch. D. 24.

Chancery against persons, who exercised their legal rights in violation of the rules of equity (*f*).

Section II.

Of Uses before the Statute of Uses.

Origin of equitable estates in land.

Equitable estates in land have their origin in the ancient practice of men putting their trusted friends in possession of their lands, in confidence that their friends would dispose thereof according to their wishes (*g*). It appears that men gave their lands to others in trust, either for purposes, which were lawful but could not be carried out without the interposition of some person trusted to execute the donor's will, or for fraudulent purposes (*h*). As to the latter, men put others into legal possession of their lands in order to defraud their creditors (*i*), or to delay actions brought to recover the lands (*k*); and for a time gifts of land to trusted laymen to the use of religious houses were employed to evade the Statute of Mortmain (*l*). The former kind of purpose is instanced by a gift of lands to others with intent to perform the donor's will, by disposing of the same according to his directions either in his lifetime or after his death. Thus, as a man could not convey to himself or his wife at common law (*m*), feoffments (*n*) were made to others in order to make a

(*f*) See *Salt* v. *Cooper*, 16 Ch. D. 544, 549; *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Clements* v. *Matthews*, 11 Q. B. D. 808; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, *ib.* 288; *Furness* v. *Bond*, 4 Times L. R. 457; *Swain* v. *Ayres*, 21 Q. B. D. 289, 293; *Warren* v. *Murray*, 1894, 2 Q. B. 648.

(*g*) As to the antiquity of this practice, see Chief Justice O. W. Holmes in L. Q. R. i. 162; P. & M. Hist. Eng. Law. ii. 228—236.

(*h*) See Bacon on Uses, 8, 9, 20, 21.

(*i*) See stats. 50 Edw. III. c. 6; 2 Ric. II. st. 2, c. 3.

(*k*) See stat. 1 Ric. II. c. 9.

(*l*) *Ante*, pp. 53, 75. This practice was stopped by stat. 15 Ric. II. c. 5.

(*m*) Bract. fo. 13. 29 a.

(*n*) *Ante*, p. 143.

settlement of the land; as where one enfeoffed another with the intent that he should re-enfeoff the feoffor and his wife to hold to them and the heirs of their two bodies, and that a fine should be levied to effect the same purpose (*o*). It appears, too, that when freeholders could only dispose of their lands by delivering seisin thereof in their lifetime (*p*), they would enfeoff others, trusting the feoffees to dispose of the land according to the feoffor's last will after his death, for instance, in paying his debts out of the profits, disposing of part for the benefit of his soul, or making estate thereof to his widow for life and afterwards to one of his sons in fee or in tail (*q*). Here the intent would also be that the feoffor should have the use of the land during his life (*r*). In course of time there grew up a practice (which seems to have been somewhat of a novelty in the reign of Edward I. (*s*), but to have been well-known in the time of Richard II.) of men putting their lands into the possession of several others jointly, or of others jointly with themselves, with the intent that the feoffees should dispose of the land according to the feoffor's will, and should hold the same, generally, for his use (*t*). This seems to have been done, not only to gain the power of testamentary disposition, but also to escape the burdensome incidents of feudal tenure; for, so long as a plural number of feoffees was maintained, the survivorship prevailing between joint tenants (*u*) prevented the accrual of the lord's right to relief, wardship and

(*o*) See Bract. fo. 262 a; *Thomas of Weyland's case*, Rot. Parl. i. 66; Madox, Form. Angl. Nos. 126, 140, 165, 170, 372, 377, 378; Bro. Abr. Feoffment al Uses, pl. 9; F. N. B. 205 G.; P. & M. Hist. Eng. Law. ii. 20 & n. (2). 91, 99, 102, 104.

(*p*) *Ante*, pp. 19, 73.

(*q*) See Bract. fo. 41 b. "Et hoc non fit tantum inter vivos, sed etiam in ultima voluntate, dum tamen donator bonam habeat memoriam, sicut fieri solet inter vivos": Abbrev. Placit. 272. col. 1. Suff. rot. 17; Rot. Parl. iii. 61; Madox, Form. Angl. Nos. 3, 107, 108, 768, 776; 1 Cal. xxi., xxxv.; 2 Cal. iii.; Selden Society, x. 49, 115, 119.

(*r*) Litt. s. 463.

(*s*) See *Thomas of Weyland's case*, Rot. Parl. i. 66.

(*t*) Selden Society, x. 44, 69, 93, 95; 1 Sand. Uses, 15—19.

(*u*) *Ante*, p. 135.

marriage (*x*), all forfeiture for treason or felony (*y*), and likewise wives' dower, an incumbrance ever sought to be evaded, as we shall see (*z*). But for the feoffor to secure these advantages, it was of course necessary that the feoffees, whom he had trusted with the legal possession of his lands, should not abuse the confidence reposed in them. It seems at first to have been usual for persons enfeoffed for a particular purpose to plight their faith to do the feoffor's will (*a*) ; as in early times a suit for breach of faith could be brought in the ecclesiastical courts (*b*). But in matters which concerned a lay fee or dealt with chattels or debts for other than testamentary or matrimonial causes, such suits were prohibited from Henry the Second's reign onward (*c*). Other checks upon feoffees in trust were also attempted (*d*), but proved insufficient when the obligation of good faith was without sanction (*e*). At length, in the reign of Richard II., relief against breach of trust was sought from the Chancellor (*f*). The application found favour, either because the clerical Chancellors were accustomed to

(*x*) *Ante*, p. 47.

(*y*) See Rot. Parl. i. 66 ; 1 Sand. Uses, 67.

(*z*) *Post*, Part I. ch. xiii.

(*a*) As to plighting faith, which still survives in the Church of England marriage service, and in the word *affidavit*, see L. Q. R. i. 161, 169, 173 ; Madox, Form. Angl. Nos. 2, 8, 84, 142, 147, 149, 151, 153—162, 630, 631, 674, 676, 688 ; P. & M. Hist. Eng. Law, ii. 186—201.

(*b*) Glanv. x. 12 ; 1 Roger de Hoveden, Rolls ed. 254 ; 2 R. de Diceto (*ibid.*), 87 ; 2 Matt. Paris, Chron. Maj. (*ibid.*), 368 ; Ann. de Burton (*ibid.*), 256, 406 ; Spence, Eq. Jur. i. 118 ; P. & M. Hist. Eng. Law, ii. 195 *sq.*

(*c*) For some time the Ecclesiastical Courts struggled hard to maintain the jurisdiction so prohibited ; and it seems to have been common to submit by consent to ecclesiastical jurisdiction in matters of breach of faith or agreement, notwithstanding that such consent would not avail to stay a prohibition. See Glanv. x. 12 ; Bract. 175 a. 401, 406 b. 410 b, 411 a ; 4 Matt. Paris. Chron. Maj. 614 ; Ann. de Burton, 417, 423 ; Madox, Form. Angl. Nos. 157—159, 161, 630, 641, 685 ; P. & M. Hist. Eng. Law. i. 108, ii. 196—200.

(*d*) *Viz.* conditions and covenants ; see L. Q. R. i. 168—170 ; Bract. 213 b ; 17 Ass. pl. 20 ; 34 Ass. pl. 1 ; Litt. ss. 352—359 ; Madox, Form. Angl. Nos. 126, 165, 170 ; P. & M. Hist. Eng. Law, ii. 215.

(*e*) See Petition of Commons, Rot. Parl. iii. 511 (4 Hen. IV. No. 112).

(*f*) Select Cases in Chancery, Selden Society, vol. x., pl. 40, 48 ; *Rothenhale* v. *Wychingham*, 2 Cal. iii.

regard breach of faith as an ecclesiastical offence (*g*), or simply on account of the dishonesty of feoffees appropriating for their own use the lands conveyed to them for the benefit of others (*h*). And thenceforward the protection of Chancery process was extended to all who claimed the benefit of a gift of lands or goods to others in *trust* for the use of the donor or his nominees (*i*).

Nature of a use.

In Edward the Fourth's reign the nature of a *use* (*k*) (which signified the interest of one, to whose use others held lands) was pretty well settled. He, to whose use a feoffment was made (called *cestui que use*), was held to have no right to the land at law: all he had was the right to sue the feoffee in trust personally in Chancery (*l*). He enjoyed a similar right against the feoffee's heir (*m*), or against his alienee, even for valuable consideration, who took the land with notice of the trust (*n*): but if the feoffee enfeoffed another of the land on a *bonâ fide* sale without notice of the use, *cestui que use* was without remedy to recover the land from the alienee, though he might sue the feoffee in Chancery for his breach of trust, and recover damages (*o*). And the feoffee in trust was bound in equity (that is, on pain of being subjected to the usual Chancery process (*p*) at suit of *cestui que use*) to allow him to take the profits of the land; to maintain actions at law at his request for the protection or recovery of the land (*q*); and to *execute the estate*, that is, to dispose of the land according to the directions of *cestui que*

Notice of a trust.

(*g*) Spence, Eq. Jur. i. 442—444; L. Q. R. i. 170.

(*h*) Professor Ames, Harvard Law Review. viii. 257; *cf.* Bacon on Uses, 15.

(*i*) See 1 Cal. xxi., xxxv., xliii., xlvii., xlviii., lxii., xc., xci., xciv.; 2 Cal. xix., xxi., xxiii., xxviii., xxxvi., xliv., xlv., xlviii., li., lvi., lxi., lxvii.; Selden Society. x., pl. 71, 72, 99, 100, 117, 118, 122, 127.

(*k*) See Co. Litt. 272 b.

(*l*) Y. B. 4 Edw. IV. 8, pl. 9.

(*m*) 2 Cal. xxviii.; Y. B. 8 Edw. IV. 6, pl. 1; Fitz. Abr. Age, 20, Subpœna, 14; Y. B. 22 Edw. IV. 6, pl. 18.

(*n*) Y. B. 5 Edw. IV. 7, pl. 16.

(*o*) Fitz. Abr. Subpœna, 19.

(*p*) *Ante*, p. 160.

(*q*) Y. B. 2 Edw. IV. 2, pl. 6; 7 Edw. IV. 29, pl. 15; see 1 Cal. xlviii.

use, or to enfeoff him thereof, should he desire it (*r*). Uses might arise by express declaration, or by implication. If a feoffment of land were expressly declared to be made to any particular use or intent, that was to be strictly observed (*s*). If no use were declared, payment by the feoffee of any sum of money, however small, would raise a use (as it was said) in his favour (*t*). But if a feoffment were made without declaring any particular intent, and without any consideration (that is, without obtaining anything in return), it became a settled rule that it should be intended to have been made to the feoffor's own use (*u*). A use was also raised by a bargain for the sale of lands and payment of the purchase-money, upon which the Court of Chancery considered that in equity the seller immediately held the land sold to the buyer's *use* (*x*). A use was freely alienable without any formality, for *cestui que use* had but to declare his will concerning the land held to his use, and the feoffees were bound to fulfil it; so that he could always make a testamentary as well as any other disposition of the use of the land (*y*).

Position of *cestui que use* at law.

Though the feoffees to uses were bound in equity to allow *cestui que use* to have possession of the land, if he desired it, the Courts of Law would not recognize his possession as that of a legal freeholder (*z*), or as held otherwise than at the will of the feoffees (*a*). They considered that *cestui que use*, having but a mere right to sue the legal tenants in Chancery, had no *estate* in

(*r*) 1 Cal. xc., xciv., cxv., cxvi.; 2 Cal. xxi., xxii., xxviii.; Bacon on Uses, 10.

(*s*) Y. B. 5 Edw. IV. 8, pl. 20; see Fitz. Abr. Subpœna, 23.

(*t*) 1 Sand. Uses, 61, 62.

(*u*) See Y. B. 11 Hen. IV. 52, pl. 30; 5 Edw. IV. 8, pl. 20; Litt. ss. 463, 464. It may be inferred from this that it was a regular practice for men to entrust their lands to feoffees to their own use; Bacon on Uses, 21, 22.

(*x*) Gilb. Uses, 49, 50 (94, 95, 3rd ed.).

(*y*) Bacon on Uses, 16; 1 Sand. Uses, 65.

(*z*) See L. Q. R. i. 167, 168.

(*a*) 1 Sand. Uses, 66 and note (*l*).

the land at law (*b*). In the Court of Chancery, however, although the interest of *cestui que use* was protected not by process against the land itself, but only by process against the trustee personally, it was nevertheless regarded as an estate in the land (*c*). As the feoffees were bound in equity to *execute the* estate at the will of *cestui que use* (*d*), he was considered in the Court of Chancery to be the true owner of the land, and to enjoy *in equity* such estate in the land as he would have had *at law*, if the estate had been executed to him by conveyance from the feoffees. Thus it came about that there might be, as it were, two estates in the same land, when it had been entrusted to feoffees to uses. There was the estate of the feoffees cognizable at common law—the legal estate; and there was the beneficial interest of *cestui que use*, not recognized at common law, but protected in equity and treated in courts of equity as being a like estate in the *use* of the land, as he would have had in the land itself, if his feoffees had executed the estate to him.

Legal estate.

Section III.

Of the Statute of Uses.

Inconveniences produced by feoffments to uses.

This system of entrusting the legal possession of lands to feoffees to uses, while *cestui que use* enjoyed actual possession thereof as apparent owner, was certainly advantageous to the latter, when once his interest was protected. But it afforded opportunities of defrauding purchasers and creditors; and, as we have seen (*e*), it infringed upon the interests of the lords and

(*b*) *Ante*, pp. 7, 8, 63; 1 Rep. 121; Bacon on Uses 5.
(*c*) 1 Sand. Uses, 64.
(*d*) *Ante*, p. 168.
(*e*) *Ante*, p. 166.

the Crown. In the reigns of Richard III. and Henry VII. statutes were passed for removing these abuses (*f*). But the remedies so applied appear to have proved insufficient; for in the next reign the Statute of Uses (*g*) was passed with the aim of entirely extirpating the evils of feoffments to uses. By this statute, after an elaborate rehearsal of all the evils which the authors of the statute conceived to have been caused by the practice of making feoffments to uses, it is enacted (*h*) that when any person or persons stand *seised* of any lands or other hereditaments to the *use*, *confidence or trust* of any other person or persons, the persons that have any such use, confidence or trust (by which was meant the persons beneficially entitled) shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have in the use, trust or confidence; and that the *estate* and *possession* of the persons so seised shall be deemed to be in the persons so beneficially entitled after such manner as the latter were entitled in the use, trust or confidence. Like provision was made to meet the case, then common, of divers persons being seised of any hereditaments to the use of any of themselves (*i*). Put shortly, the effect of the Statute of Uses is this:—If one or several be seised of any hereditaments to the use of another or others, or of one or more of themselves, the person or persons having the use of the same hereditaments shall be deemed to be in possession thereof for such estate as he or they has or have in the use. The statute in fact executes the estate (*k*) to *cestui que use*; that is, it gives him the same estate and possession at law as he would have if the feoffees to his use had executed the estate to him, or duly made to him a proper legal conveyance of the land. Thus, if A. and B. be seised of

The Statute of Uses.

(*f*) See stats. 1 Ric. III. c. 1; 4 Hen. VII. c. 17; 19 Hen. VII. c. 15; 1 Sand. Uses, 21, 52, 53.
(*g*) Stat. 27 Hen. VIII. c. 10.
(*h*) Sect. 1.
(*i*) Sect. 2. See *ante*, p. 166. Bacon on Uses, 49.
(*k*) *Ante*, p. 168.

land in fee simple to the use of C. and his heirs, by the Statute of Uses, C. shall be deemed in lawful seisin of the land for such estate as he has in the use of the land, and the estate and possession of A. and B. shall be deemed to be in C. after such manner as C. was entitled in the use. C. thus by force of the statute becomes tenant in fee simple of the land at law; and he is deemed at law to be in possession of the land, though he may never have entered upon, or even seen it (*l*). And the estate and possession of A. and B. is altogether taken away from them, and considered at law to be in C. Similarly, if land be conveyed to A. and B. in fee simple to the uses of A. and his heirs, the Statute of Uses at once gives to A. an estate in fee simple in possession at law. And the law is the same of implied uses as of uses expressly declared. Thus if A., seised of land in fee simple, made a feoffment thereof to B. and his heirs, with due livery of seisin, but without consideration and without expressly declaring any *use* of the land, we have seen (*m*) that it was implied in law that A. should have the use of the land. But by the statute A. having the use of the land is deemed to have seisin of the land for the same estate as he has in the use; and all B.'s estate and possession is deemed to be in A. A. therefore, the feoffor, instantly gets back all he gave; and the use is said to *result* to himself (*n*). The propriety of inserting in every feoffment the words *to the use of*, as well as *to*, the feoffee is therefore manifest (*o*). The Statute of Uses is still in force; and though it has failed to impress the popular imagination as vividly as

Resulting use.

(*l*) He is not, however, deemed to be in possession for the purpose of maintaining an action of trespass, which is founded on disturbance of the actual possession of the land; Gilb. Uses, 81 185, 3rd ed.): 2 Fonb. Eq. 12; *Harrison* v. *Blackburn*, 17 C. B., N. S., 678. See *Anon.*, Cro. Eliz. 46; *Heelis* v. *Blain*, 18 C. B., N. S., 90; *Hadfield's case*, L. R. 8 C. P. 306.

(*m*) *Ante*, p. 169.

(*n*) See 1 Sand. Uses, 99 *sq.*

(*o*) *Ante*, p. 148.

the *Habeas Corpus* Act (*p*), it forms one of the most important landmarks of real property law, and should be deeply graven on every conveyancer's heart. It will be observed that the statute made it possible to transfer the property in land from one to another by duly conveying the estate to a third party, to the use of the other. For directly the third party became seised of the land to the other's use, the Statute of Uses annexed the legal estate in the land to the estate in the use (*q*). This curious result of the statute remains law to this day, and, as we shall see, is constantly applied in practice. If, therefore, A. convey land to B. in fee simple to the use of C. and his heirs, B., to whom the land is given, now takes no estate therein at law, but C., in whose favour the use is declared, is at once invested with an estate in fee simple in the land. The words *to the use of* are now almost universally employed when it is intended that an estate in the land shall vest in any person by force of the Statute of Uses; but "upon confidence" or "upon trust for" would answer as well, since all these expressions are mentioned in the statute.

Section IV.

Of Trusts after the Statute of Uses.

The Statute of Uses did not apply to every kind of trust of land. When one was enfeoffed of land, not simply to another's use, but for some special use or trust imposing an active duty on the feoffee (as to sell land or pay debts out of the profits), it was held that no estate could be executed by the statute, so as to deprive

Special trusts.

(*p*) See Black. Comm. iii. 135, iv. 138.

(*q*) *Ante*, p. 171.

him of the legal ownership, without which he could not perform his trust (*r*). Thus the Chancery jurisdiction over special trusts remained unaffected by the statute. Nor did the Act apply to trusts of terms of years or other chattels; for it only spoke of persons *seised* of lands for others' use (*s*). But in the case of trusts of freeholds for others' use simply, the estates in the use, being turned into legal estates by the statute, were withdrawn from the Chancellor's exclusive jurisdiction. In this respect therefore the Act at first succeeded in effecting its designers' object. But after the lapse of about a century (*t*), the active exercise of the Chancery jurisdiction over such trusts was revived, and estates in equity only, since known as trust estates, again arose and have continued to the present day. The necessity for the Chancellor's interposition was caused by the doctrine

(*r*) 1 Spence. Eq. Jur. 466; 1 Sand. Uses. 243 *sq.*

(*s*) Poph. 76; Bacon on Uses, 42. Nor did the Act apply to copyholds; Co. Cop. s. 54.

(*t*) In this I follow the opinion expressed by Professor Ames in the Green Bag, iv. 81. He alleges in proof:—(1) The absence of all mention in the writings of Coke and Bacon, and in the cases asserting the doctrine of no use upon a use, that the second use was enforceable in equity as a trust: Bro. Abr. Feoffment al Uses, pl. 54; Moore, 45, pl. 138; *Dillon* v. *Freine*, Poph. 81; *Stoudley* v. *Bracebridge*, 1 Leon. 6; *Read* v. *Nash*, *ib.* 148; *Girland* v. *Sharp*, Cro. Eliz. 382; *Hore* v. *Dix*, 1 Sid. 26; *Tippin* v. *Cusin*, Carth. 273. (2) The denial of relief in equity upon an express simple trust against a *cestui que use* taking the legal estate under a use raised by payment of money: Crompton, Courts, 54 a; Cary, 19; *Holloway* v. *Pollard*, Moore, 761, pl. 1054. (3) That simple trusts being in effect uses would have been forfeitable for treason under stat. 33 Hen. VIII. c. 20; but it was agreed about 1595 that no use could be forfeited, as all uses of freehold were then executed in possession by the statute: 1 And. 294. Professor Ames understands the *dictum* in *R.* v. *Daccombe*, Cro. Car. 513, of special trusts, and Coke's remarks in *Foord* v. *Hoskins*, 3 Bulst. 336, 337, as made of uses before the statute. (4) That the first mention of relief in equity in case of a use upon a use is in *Sambach* v. *Dalton*, Tothill, pl. 168 (apparently about 1634; see 1 Spence, Eq. Jur. 491, n.); and that a distinction was long taken between cases where the first use was raised by money payment, and where both uses were expressly and gratuitously declared: see Compleat Attorney (1666), p. 265; Shepp. Touch. 507, 510; *Ash* v. *Gallen*, 1 Ch. Ca. 114; Gilb. Uses, 162; and that the novelty of relief in equity in case of a use upon a use is shown by the express mention of the fact in *Daw* v. *Newborough* (1715), Com. 242.

established in the courts of common law that there can be *no use upon a use*, or that when the statute has once transferred the legal estate in land to a person in whose favour a use is raised, it will have no further operation: so that no uses or trusts of the land in the hands of *cestui que use* will take effect as estates at law. This doctrine is based upon a rule laid down before the Statute of Uses that if one bargained and sold land to another to the use of the bargainor, or of some third person, as a use was implied in the bargainee's favour by his payment of the consideration (*u*), the use declared was void for repugnancy (*x*). Soon after the statute the same rule was applied in a similar case, in which it was considered that, as the use raised in the bargainee's favour was the effective use, the other being repugnant and void, the statute executed the estate in the bargainee (*y*). It was also determined that, in case of a conflict between two uses expressly declared (as where land was given to feoffees to the use of A. in fee to the use of B. in fee), since a use is the right to take the profits of land, and if one have this right another cannot, the second use was void for repugnancy to the use first declared. In such a case, therefore, the effect of the statute was to annex the legal estate to the first use (*z*). But after a time the reason of these decisions seems to have been overlooked, and the doctrine, that the law admits no use upon a use, was propounded as an arid dogma (*a*). In this shape it

No use upon a use.

(*u*) *Ante*, p. 169.

(*x*) Bro. Abr. Feoffment al Uses, 40; Gilb. Uses, 161. For the explanation here given of the doctrine of no use upon a use I am indebted to an article by Professor Ames, in the Green Bag, iv. 81.

(*y*) Bro. Abr. Feoffment al Uses, 54; *Tyrrel's case*, Dyer, 155: 1 And. 37 (pl. 96), 313; 2 And. 136.

(*z*) See 2 And. 136: Moore, 45, pl. 138: *Daw* v. *Newborough*, Comyns, 242; *A.-G.* v. *Scott*, Ca. t. Talb. 138. So if land be conveyed unto and to the use of A. and his heirs to the use of B. and his heirs, in which case A. takes the legal estate at common law, the Statute of Uses will not operate to give the legal estate to B.; *Doe* d. *Lloyd* v. *Passingham*, 6 B. & C. 305.

(*a*) See Hardwicke, C., *Hopkins* v. *Hopkins*, 1 Atk. 591: Sugden's note to Gilb. Uses, 161 (p. 347, 3rd ed.): *Doe* d. *Lloyd* v. *Passingham*, *ubi sup.*

is still law (*b*); so that if at the present time land be conveyed to A. and his heirs to the use of B. and his heirs to the use of C. and his heirs, only the first use, that declared in B.'s favour, will be executed by the statute; that is to say, the statute will annex the legal estate to the first use, so that B. shall have the fee simple at law, but it will have no further operation; and C. will therefore take no estate at all at law.

The practice after the statute.

Now, it seems that conveyancers soon began to make a servant of the statute of limiting lands to feoffees and their heirs to the use of others, with the express purpose of causing the legal estate to be executed to the *cestui que use*. But it does not appear that the Statute of Uses was immediately evaded by the device of limiting a use upon a use, in order that the first *cestui que use* should take the legal estate by virtue of the statute, and the second enjoy the benefit of a trust enforceable in equity. On the contrary, the statute seems to have given a death-blow to the practice of landowners enfeoffing trustees to hold to their use generally. After the Act, conveyancers cast about in search of new methods of dealing with land, and eventually they used the statute as the means of carrying out the modern system of settlement (*c*), which was effected by the limitation of a series of successive uses intended to be turned into legal estates by the statute (*d*). This system quite superseded the practice

(*b*) *Cooper* v. *Kynock*, L. R. 7 Ch. 398.

(*c*) *Ante*, pp. 100, 112, 117, & n. (*i*). It was only by means of the Statute of Uses that express powers of leasing or sale could be created; *post*, pt. ii., ch. 3.

(*d*) The course of conveyancing practice after the statute is shown in Phaer's Book of Precedents (1561) and West's Symboleography (1605), Part 1. In the latter book we see the beginning of the practice of limiting lands to unborn sons successively in tail after their father's life estate: see §§ 84, 87, 89, 266, 287. The former book does not contain any precedent of a deed limiting a trust of lands for others' use *simply*, by way of use upon a use. West has a precedent (§ 289) of a feoffment to twelve persons and their heirs to their and their heirs' own use on a *special* trust; see also § 284.

of giving the whole estate in fee simple to trusted friends, who should be tenants of the land at law, but hold it upon trust for others in equity. Still, cases apparently arose, some time after the Statute of Uses, in which it was desired to place freeholds in the hands of trustees for others simply. The expedient was then tried of limiting a use upon a use; and application was made to the Chancellor to enforce the second use as a trust (*e*). The case fell within the same principle as had originally prevailed in determining that Chancery process should issue against any person who committed a breach of trust reposed in him with regard to property of which he was made the legal owner. And it became established, accordingly, that trusts should be equally enforced in equity when the trustee became possessed of the land by the operation of the Statute of Uses, as when he took the estate at common law (*f*). If, therefore, lands be conveyed to A. and his heirs to the use of B. and his heirs to the use of or in trust for C. and his heirs, though B. will become tenant in fee simple at law under the Statute of Uses, yet in equity he will be bound to hold the land and apply its profits for C.'s use; and C. will be considered to be in equity the owner of the land. In this way, equitable estates in land (*g*) were completely re-established. Here it may be noted that, since the above doctrines have become well established, it has not been the practice to employ the word *use* when intending to create a trust enforceable in equity. And it is usually expressed that lands shall be held *to the use* of any one, only when it is intended that he shall take the legal estate therein. To impose a trust, it is generally declared that the legal owner (he, to whose *use* the land is in the first place given) shall hold it *in trust* for the person or purposes desired.

(*e*) See *ante*, p. 174, n. (*t*).
(*f*) See *ante*, p. 168.
(*g*) *Ante*, p. 170.

Equitable estate.

Trustee and *cestui que trust*.

An equitable or trust estate, then, is the name given to the interest of one, *in trust for* whom another holds lands as legal owner. In such a case the holder of the legal estate (*h*) in the land is called the trustee; while the person beneficially entitled is called, in law French, *cestui que trust*. The nature of a trust estate, since the Statute of Uses, is similar to that of a use of lands before the statute (*i*). Thus trusts are still either special or simple (*k*). Of the special trust, where the trustee has an active duty to perform, as to sell lands and distribute the proceeds of sale among specified persons, no more need be said than that in such a case the estate is not executed by the Statute of Uses (*l*), and it is the trustee's duty to perform exactly the will of the person who has created the trust, as declared at the time of its creation (*m*). In simple trusts, where one is a trustee of land for another simply, the trustee is bound, as in the case of the old uses (*n*), to maintain actions for the defence of the land, to allow *cestui que trust* to have possession and take the profits thereof, and, if the trust be for *cestui que trust* in fee simple, to convey the legal estate in the land as he shall direct, or to him, if he desire it (*o*). Furthermore, the nature of a trust estate remains the same. Strictly speaking, it is but a right against the trustee personally. It has been established, however, that the trust is so far annexed to the trustee's estate that, as a general rule, all persons who acquire that estate are bound by the trust. Thus the trust may be enforced against all persons who may take the trustee's estate by act of law or gratuitous conveyance from him: as his heirs,

(*h*) *Ante*, p. 169.

(*i*) 1 Sand. Uses, 266; Lewin on Trusts, 13, 6th ed.: 11, 10th ed.; *ante*, p. 168.

(*k*) Lewin on Trusts, 18, 6th ed.: 16, 10th ed.

(*l*) *Ante*, p. 171; Lewin on Trusts, 187, 6th ed.; 224, 10th ed.

(*m*) See Lewin on Trusts, 339 *sq.*, 374 *sq.*, 444 *sq.*, 484, 556, 568, 6th ed.: 445 *sq.*, 483 *sq.*, 579, 675, 824, 841, 10th ed.

(*n*) *Ante*, p. 168.

(*o*) Lewin on Trusts, 556, 565, 696, 6th ed.: 824, 836, 1039, 10th ed.

executors, administrators, devisees and creditors (*p*). So purchasers having actual or constructive notice of the trust are bound by it (*q*). But if the trustee convey the trust estate to a *bonâ fide* purchaser for value, who has no notice of the trust, the latter will not be bound thereby, but will be entitled to retain and enjoy, for his own benefit, the legal ownership he has acquired from the trustee. For in such a case, *cestui que trust* has no *equity* against him, but can only sue the fraudulent trustee for his breach of trust under the Court's equitable jurisdiction (*r*). It is not until we examine this apparent exception to the rule that the nature of a trust estate is made plain. We then see that it is not a true right of ownership, enforceable against the land directly, without the intervention of another person's action, and maintainable against all other persons whomsoever; but is properly a mere obligation incumbent on the legal owner of land, and enforceable against some, but not all, of those who succeed to his estate (*s*). As has been already indicated, however (*t*), notwithstanding this liability of *cestui que trust* to be wrongfully deprived of his interest in the land by the fraudulent dealings of his trustee, he is considered to be in equity the owner of the land, *as against all persons bound by the trust*, and his beneficial interest is treated as being in equity an estate in the land (*u*).

Creation of trusts.

Trusts of property may be created by act of the parties or operation of law. Express trusts are created either by duly conveying the legal interest in the property to others on *trust* for the persons desired to

(*p*) Lewin on Trusts, 215, 6th ed.: 264, 10th. ed.

(*q*) Lewin on Trusts, 699, 6th ed.: 1044, 10th ed.

(*r*) *Mansell* v. *Mansell*, 2 P. W. 678, 681; *Willoughby* v. *Willoughby*, 1 T. R. 763, 771—773; Lewin on Trusts, 700—702, 737, 6th ed.; 1045—1047, 1103, 10th ed.

(*s*) See Lewin on Trusts, 13—16, 6th ed.: 11—14, 10th ed.

(*t*) *Ante*, p. 170.

(*u*) See Lewin on Trusts, 10, 556 *sq.*, 6th ed.: 8, 824 *sq.*, 10th ed.

be benefited, or, without any transfer of the legal ownership, by the owner declaring that he will hold the property on trust for them. When a declaration of trust has been duly made, either with or without a conveyance of the legal interest, the trust will be enforceable in equity, although no consideration (*x*) should have been given for its creation. But a mere voluntary covenant or promise to transfer property to another, made without any declaration of trust, and not carried out by conveyance of the property at law, will not be specifically enforced in equity (*y*). Trusts may also be implied in certain cases, in which the acts of the parties shew an intention to create them. A sale of land is an instance of this, when the vendor is at once held to be trustee for the purchaser (*z*). But no trust will be implied from such a voluntary covenant or promise as has just been mentioned (*a*). Trusts are said to arise by operation of law in the following cases, when they are created by implication of equity without any expression in word or act of the parties' intention (*b*), that is to say: (1) Where an owner conveys away his property at law, but it cannot be inferred that he intended to dispose of the beneficial interest therein; for instance, where property is conveyed in trust for purposes which fail or do not exhaust the whole estate conveyed (*c*); or where one makes a gratuitous transfer of property at law, but no intention of gift can be inferred. (2) Where a purchaser of property takes a conveyance of the legal interest therein in the name of another, and there is nothing to shew that he intended the other to benefit. In these cases there is said to be a resulting trust in favour of the

Implied trusts.

Resulting trusts.

(*x*) *Ante*, p. 78.

(*y*) Lewin on Trusts, 60 *sq.*, 6th ed.: 68 *sq.*, 10th ed.

(*z*) Lewin on Trusts, 114 *sq.*, 124, 6th ed.: 140 *sq.*, 153, 10th ed.

(*a*) *Richards* v. *Delbridge*, L. R. 18 Eq. 11; Lewin on Trusts, 60 *sq.*, 6th ed.: 68 *sq.*, 10th ed.

(*b*) Lewin on Trusts, 95, n., 171, 6th ed.: 117, n., 206, 10th ed.

(*c*) *Re West*, 1900, 1 Ch. 84.

owner or purchaser (*d*). (3) If a trustee use his position of legal owner to obtain some valuable interest in property for himself: when he will be held in equity to be a trustee thereof, constructively, for those whose benefit he was entrusted with such legal ownership (*e*). Constructive trust.

In the regulation of trust estates and interests the Court of Chancery was generally guided by the principles applicable to estates and interests at law (*f*). Thus simple trusts created of real or personal property confer on *cestui que trust* an interest in equity of the nature of real or personal estate, as the case may be; so that *cestui que trust* of lands in fee simple has an estate in equity transmissible to his heirs, but his interest in chattels held on trust for him will pass to his executors or administrators (*g*). Again, trusts declared in favour of one and his heirs, or of him and the heirs of his body, or of him for life, will create equitable estates in fee simple, fee tail, or for life, analogous to the legal estates conferred by similar limitations (*h*). But it is not necessary, in making a declaration of trust, to use the same technical expressions as are required to limit estates at law (*i*). Thus equitable estates in fee simple or tail may be conferred without the use of the words *heirs* or *heirs of the body*, if the intention be clear (*k*). But where formal and complete limitations of the equitable estate in land are made by deed (*l*), an intention to confer a fee must be Real and personal estate in equity.

(*d*) See Lewin on Trusts, 126 *sq.*, 6th ed.: 155 *sq.*, 10th ed.

(*e*) Lewin on Trusts, 160 *sq.*, 6th ed.: 192 *sq.*, 10th ed.

(*f*) 1 Sand. Uses, 269 (280, 5th ed.).

(*g*) *Ante*, pp. 19—22; see Lewin on Trusts, 84, 132 *sq.*, 252, 669—672, 6th ed.: 97, 162 *sq.*, 307, 1004—1008, 10th ed.

(*h*) *Ante*, pp. 63, 65, 89, 110, 112.

(*i*) *Ante*, p. 145.

(*k*) Shep. Touch. (Preston's ed.), 106; Preston on Estates, ii. 64—66; Haynes on Conveyancing, 91, 92, 5th ed.; Lewin on Trusts, 95, 6th ed.; 117, 10th ed.; Williams, Real Prop. 165, 13th ed.; Williams on Settlements, 60. It is submitted that the opinion of these distinguished conveyancers on this point is correct, and is not affected by the cases mentioned in note (*m*), below.

(*l*) If land be devised by will

clearly expressed: for, if not, such a limitation to one simply, without further words, will only give him a life estate (*m*), as in the case of a similar grant at law (*n*). So the rule is that, where technical legal terms are employed in a declaration of trust, they will be construed in equity according to their technical sense at law (*o*). An exception is, however, made in certain cases of executory trusts (*p*), when the Court will have regard to the intention of their author in construing technical terms (*q*). Thus in the case of marriage articles, where an intention to provide for the children of the marriage is inferred, words which at law would confer an estate tail may be construed in equity as giving merely an estate for life, followed by separate and independent estates tail to the children of the donee; for the intention would be defeated by vesting an estate tail in one of the parents, who could at once bar the entail, and so deprive the children of all benefit (*r*). Similar regard to intention is shewn in the construction of implied trusts (*s*). Thus an equitable estate in fee simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for purchase, provided the vendor has a good title (*t*): and it is understood that the whole estate of the vendor is contracted for, unless a smaller estate is expressly mentioned, the employment of the word *heirs*, or of other technical words, not being

Equitable estate in fee simple.

to trustees in fee on trust for one simply, without further words, he takes the whole beneficial interest; Lewin on Trusts, 96, 6th ed.: 118, 10th ed.

(*m*) *Re Whiston's Settlement*, 1894, 1 Ch. 661, and cases there cited.

(*n*) *Ante*, p. 110.

(*o*) Lewin on Trusts, 96, 6th ed.: 118, 10th ed.

(*p*) Trusts are said to be *executed* when the author of the trust has made complete and final limitations of the equitable estate: they are called *executory* when he has expressed a general intention of trust for some person or persons to be carried out by some further act or instrument, without exactly defining the estates intended to be conferred; as where it is directed that property shall be settled on certain persons: Lewin on Trusts, 97, 6th ed.: 120, 10th ed.

(*q*) Lewin on Trusts, 97 *sq.*, 6th ed.: 120 *sq.*, 10th ed.

(*r*) Lewin on Trusts, 99, 100, 6th ed.: 121—123, 10th ed.

(*s*) *Ante*, p. 180.

(*t*) Sug. V. & P. 174 *sq.*

essential (*u*). If, therefore, the purchaser were to die intestate the moment after the contract, the equitable estate in fee simple, which he had just acquired, would descend to his heir at law, subject, however, since the Land Transfer Act, 1897 (*x*), to the interest which his executors or administrator would take therein for the purpose of paying his debts. And the vendor would be a trustee, until he should have made a conveyance of the legal estate pursuant to the contract for sale, in the first instance for the purchaser's executors or administrator, but if the estate were not required for debts or expenses, then for the purchaser's heir. And if the purchaser should have devised the lands, his devisee would be entitled in like manner as the heir in case of his intestacy (*y*). So an agreement for a lease for years will give the lessee an estate in equity during the term (*z*). Indeed equity regards the consequences of any act directed by a legal agreement or a declaration of trust as immediate; for this purpose what ought to be done is in equity considered as actually accomplished (*a*). For example, if lands be directed to be sold, and the money to arise from the sale be directed to be laid out in the purchase of other land to be settled on certain persons for life or in tail, or in any other manner, such persons will be regarded in equity as already in possession of the estates they are intended to have (*b*). And in the same manner if money, from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom the lands are to be settled as already

Equitable estate tail in lands to be purchased.

(*u*) *Bower* v. *Cooper*, 2 Hare, 408.

(*x*) Stat. 60 & 61 Vict. c. 65, Part I., *ante*, pp. 29, 57, 74, 108, 131, 137.

(*y*) 1 Dart. V. & P. 283 *sq.*, 303, 6th ed. Formerly the heir or devisee would have had the right, to be enforced in equity, to have the estate paid for out of the deceased purchaser's personalty; but since the passing of stat. 40 & 41 Vict. c. 34, this is no longer the rule.

(*z*) *Warren* v. *Murray*, 1894, 2 Q. B. 648.

(*a*) Lewin on Trusts, 767, 6th ed.: 1151, 10th ed.

(*b*) *Re Cleveland's Settled Estates*, 1893, 3 Ch. 244.

in the possession of their estates (*c*). And in both of the above cases the estates tail directed to be settled may be barred before they are actually given, by a disposition, duly enrolled, of the lands which are to be sold in the one case, or of the money to be laid out in the other (*d*). Many other examples of equitable or trust estates might be furnished.

Possession of *cestui que trust.*

At law, the possession of *cestui que trust* in occupation of the land was merely that of a tenant at will to his trustees. Before the Judicature Acts, therefore, if he wished to have the benefit of a greater right to maintain or recover possession than is accorded to tenant at will (*e*), he must have directed his trustees to take action for him, and must have sued them in a court of equity for any breach of trust in this respect (*f*). But the effect of the Judicature Acts (*g*) appears to be that the equitable right to possession of land enjoyed by *cestui que trust* shall now be recognised and enforced in every branch of the Court which now exercises the jurisdiction of the old Superior Courts, both of law and equity (*h*).

Free enjoyment of *cestui que trust.*

As regards free enjoyment, an equitable tenant in fee or in tail has as ample a right as the tenant of a like estate at law (*i*): but an equitable tenant for life may be restrained from and is liable for committing waste to the same extent as a legal tenant for life (*k*). Here it

(*c*) 1 Sand. Uses, 300 (324, 5th ed.).

(*d*) Stat. 3 & 4 Will. IV. c. 74, ss. 70, 71, replacing 7 Geo. IV. c. 45; and 39 & 40 Geo. III. c. 56.

(*e*) See Bac. Abr. Trespass (C. 3); Cole on Ejectment, 211—213. 287; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(*f*) *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684; *Goodtitle* d. *Jones* v. *Jones*, 7 T. R. 43; *Doe* d. *Reade* v. *Reade*, 8 T. R. 118; Lewin on Trusts, 558, 696, 6th ed.; 828, 1039, 10th ed.

(*g*) *Ante*, p. 164.

(*h*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Furness* v. *Bond*, 4 Times L. R. 457; *Lowther* v. *Heaver*, 41 Ch. D. 248, 264; *Warren* v. *Murray*, 1894, 2 Q. B. 648.

(*i*) *Ante*, pp. 79, 107.

(*k*) *Baker* v. *Sebright*, 13 Ch. D. 179; Lewin on Trusts, 486, 6th ed.: 677, 10th ed.: *ante*, pp. 113—116.

may be explained that a tenant in fee simple at law may in equity be subject to perpetual restrictions in the use of his land imposed by his own agreement or that of his predecessors in title for the benefit of the owners and occupiers of some other land; for instance, not to build over part of his land, or not to use any house thereon as a public-house or hotel. Such an equity may be enforced by injunction at suit of such owners or occupiers against the tenant, his heirs and assigns, either of the whole or part of his estate, except only (as in the case of other equities (*l*)) such assigns as have acquired the land as purchasers for value without notice of the restriction (*m*).

Restrictions on the use of land in equity.

Free power of disposition *inter vivos* or by will has always been incident to a trust estate, as it was to an estate in use before the statute (*n*). But this power is of course commensurate with the estate of the *cestui que trust*. Thus an equitable estate tail must be barred in the same manner as an estate tail at law; that is to say, since 1833, by deed duly enrolled (*o*), and previously by suffering a common recovery (*p*). So *cestui que trust* of lands for life only can dispose, for his own benefit, of no greater interest than during his own life. But any person who is beneficially entitled in possession to an equitable estate in land in tail or for life, now has the powers of leasing, sale and other powers given to a

Power of disposition of trust estates.

(*l*) *Ante*, p. 168; see Jessel, M. R., 20 Ch. D. 583; Lord Esher, M. R., 16 Q. B. D. 787; Lindley, L. J., *ib.* 788.

(*m*) See *Tulk* v. *Moxhay*, 2 Ph. 774; *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Tate* v. *Gosling*, 11 Ch. D. 273; *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750; *Spicer* v. *Martin*, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388; Sug. V. & P. 596; see *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 28 Ch. D. 103; *Knight* v. *Simmonds*, 1896, 2 Ch. 294.

(*n*) *Ante*, p. 169; Lewin on Trusts, 572 *sq.*, 6th ed.; 845 *sq.*, 10th ed.

(*o*) Stat. 3 & 4 Will. IV. c. 74, ss. 1, 15, 40.

(*p*) Cruise on Recoveries, 271; Lewin on Trusts, 573 *sq.*, 6th ed.; 846 *sq.*, 10th ed.; *ante*, pp. 94—98.

tenant for life by the Settled Land Act, 1882 (*q*); to give effect to which, he is empowered, equally with the tenant of a legal life estate, to convey the settled land for all the estate, which is the subject of the settlement (*r*). Trust estates are now liable to involuntary alienation for debt, equally with legal estates: as will be further explained in treating of creditors' rights (*s*).

Alienation for debt.

Creation and transfer of trust estates.

Trusts or equitable estates may be created and passed from one person to another, without the use of any particular ceremony or form of words (*t*). But, by the Statute of Frauds (*u*), it is enacted (*x*), that no action shall be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is also enacted (*y*), that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and further (*z*), that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law, and trusts transferred or extinguished by an act or operation

Statute of Frauds.

(*q*) Stat. 45 & 46 Vict. c. 38, ss. 2 (5. 10 (i)) 58; *ante*, pp. 118—123.
(*r*) Sect. 20; *ante*, p. 123.
(*s*) *Post*, Pt. I., ch. xi.
(*t*) 1 Sand. Uses, 315, 316 (343, 344, 5th ed.): Lewin on Trusts, 45 *sq.*, 6th ed.; 51 *sq.*, 10th ed.
(*u*) 29 Car. II. c. 3.
(*x*) Sect. 4; Sug. V. & P. 121 *sq.*
(*y*) Sect. 7; *Tierney* v. *Wood*, 19 Beav. 330; *Dye* v. *Dye*, 13 Q. B. D. 147.
(*z*) Sect. 9.

of law, are exempted from this statute (*a*). In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary (*b*). If writing is used, and duly signed, in order to satisfy the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose (*c*).

Devolution on death.

Under the Land Transfer Act, 1897 (*d*), equitable estates in fee simple devolve, equally with legal estates, to the executors or administrator of the deceased *cestui que trust* in the first instance; the heir or devisee nevertheless retaining his beneficial title subject to the executors' or administrators' interest and to their power of sale for payment of debts or testamentary or administration expenses. With regard to the heir's interest, the descent of an equitable fee upon intestacy follows the same course as that of the legal fee (*e*); and, therefore, in the case of gavelkind and borough-English lands (*f*), trusts affecting them will descend according to the descendible quality of the tenure (*g*). Formerly, an equitable estate in fee did not escheat to the lord upon

Descent of equitable fee.

Formerly, no escheat of a trust estate.

(*a*) Sect. 8: see *ante*, p. 180.

(*b*) 1 Sand. Uses, 342 (377, 5th ed.); Lewin on Trusts, 573, 6th ed.: 846, 10th ed.

(*c*) Agreements, as a rule, now bear a stamp duty* of sixpence, which may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. But an agreement for the sale of any equitable estate or interest in any property whatsoever is now chargeable with the same *ad valorem* duty as if it was an actual conveyance on sale of the estate, interest or property agreed to be sold (see *post*, Part VI.). It may, however, be stamped with the same stamp as an ordinary agreement if a further conveyance of the estate or interest sold be contemplated, in which case the further conveyance must be stamped with the *ad valorem* duty, as a rule, within six months after the first execution of the agreement. Declarations of trust of any property made by any writing, not being a will or an instrument chargeable with *ad valorem* duty as a settlement, are charged with a stamp duty of 10*s*. See stat. 54 & 55 Vict. c. 39, ss. 1, 7, 8, 22, 59, and 1st schedule, replacing stat. 33 & 34 Vict. c. 97, s. 36 & schedule: *Farmer* v. *Commissioners of Inland Revenue*, 1898, 2 Q. B. 141.

* Stamp Duty.

(*d*) Stat. 60 & 61 Vict. c. 65, Part I., *ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183.

(*e*) *Ante*, p. 85, and *post*, ch. ix.

(*f*) *Ante*, pp. 58, 60.

(*g*) 1 Sand. Uses, 270 (283, 5th ed.); Lewin on Trusts, 670, 6th ed.: 1006, 10th ed.

failure of heirs of the *cestui que trust* (*h*); for a trust is a mere creature of equity, and not a subject of tenure. In such a case, therefore, the trustee held the lands discharged from the trust which had so failed; and accordingly had a right to receive the rents and profits without being called to account by any one. In other words, the lands were thenceforth his own (*i*). But from and after the passing of the Intestates' Estates Act, 1884 (*k*), where a person dies without an heir and intestate (*l*) in respect of any real estate consisting of any equitable estate or interest in any corporeal or incorporeal hereditament, the law of escheat shall apply in the same manner as if such estate or interest were a legal estate in corporeal hereditaments (*m*). Before the abolition of forfeiture for treason, it was the better opinion that, in the event of high treason being committed by the *cestui que trust* of an estate in fee simple, his equitable estate would be forfeited to the Crown (*n*).

Law of escheat now applies to trust estates.

Treason.

Trustees, as we have seen (*o*), are invariably made joint tenants. So that, if there are more trustees than one, upon the death of one of them the estate in any land subject to the trust vests at once in the surviving trustees or trustee. Formerly, upon the death of a sole or sole surviving trustee of lands, the legal estate therein passed to his devisee or heir at law, according as he had or had not devised the same by his will, in each case subject to the trust (*p*). But now, by the

Descent of estate of trustee.

(*h*) 1 Sand. Uses, 288 (302, 5th ed.).

(*i*) *Burgess* v. *Wheate*, 1 Wm. Bl. 123; 1 Eden, 177; *Taylor* v. *Haygarth*, 14 Sim. 8; *Darall* v. *North Eastern Co.*, 3 De G. & S. 391; *Beale* v. *Symonds*, 16 Beav. 406; *Gallard* v. *Hawkins*, 27 Ch. D. 298.

(*k*) Stat. 47 & 48 Vict. c. 71, s. 4; passed 14th August, 1884.

(*l*) See sect. 7; *Re Wood*, 1896, 2 Ch. 596.

(*m*) See *ante*, pp. 48, 55.

(*n*) 1 Hale, P. C. 249; *ante*, pp. 49, 56.

(*o*) *Ante*, p. 136.

(*p*) See Wms. Conv. Stat. 171. On the death of a bare trustee intestate between the 7th Aug., 1874, and the 31st Dec., 1881, any hereditament of which he

Conveyancing Act of 1881, on the death after the year 1881 of a sole trustee of any freehold estate or interest of inheritance in any hereditaments, the same shall, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives, in like manner as if the same were a chattel real (*q*). It was never precisely decided, whether, in case of the failure of heirs of the trustee of an estate in fee simple, the lord taking the land by escheat (*r*) was bound by the trust; for he did not succeed to the trustee's estate, but claimed by title paramount (*s*). But, since 1834, both the lord's right of escheat and the Crown's right of forfeiture have been taken away by statute in the case of the failure of heirs or corruption of the blood of a trustee of lands; except so far as he himself might have any beneficial interest in such lands (*t*).

Failure of heirs of trustee.

When lands are vested in trustees, it is obvious that it may become desirable to appoint new trustees in the place of any, who may die, leave the country or become incapable of acting in the trust, or in other events. Formerly this could only be done with the concurrence of all the *cestui que trusts* being *sui juris*, or under the authority of the Court of Chancery (*u*), or by virtue of

Appointment of new trustees.

was seised in fee simple vested in his legal personal representative: stat. 38 & 39 Vict. c. 87. s. 48.

(*q*) Stat. 44 & 45 Vict. c. 41. s. 50. amended as to copyholds by stat. 57 & 58 Vict. c. 46, s. 88. replacing 50 & 51 Vict. c. 73, s. 45; see Wms. Conv. Stat., 170—176; *Re Pilling's Trusts*, 26 Ch. D. 432.

(*r*) *Ante*, pp. 48. 55.

(*s*) See Lewin on Trusts. Introd. 11, 15. 216. 6th ed.; 9. 14. 266. 10th ed.

(*t*) Stat. 4 & 5 Will. IV. c. 23. replaced by 13 & 14 Vict. c. 60. ss. 15. 46. 47. and now by 56 & 57 Vict. c. 53. s. 26.

(*u*) New trustees might always be appointed by the Court of Chancery, under its general jurisdiction to execute trusts, upon the institution of a *suit* for that purpose: *Howard* v. *Rhodes*, 1 Keen. 581; *Coventry* v. *Coventry*, *ib.* 758; *Dodkin* v. *Brunt*, L. R. 6 Eq. 580. The Trustee Acts. 1850 and 1852. empowered that Court to make an order appointing new trustees, upon *petition*: stats. 13 & 14 Vict. c. 60, s. 32; 15 & 16 Vict. c. 55. s. 9. now replaced by 56 & 57 Vict. c. 53, s. 25; and this jurisdiction may now be exercised by a judge in chambers on *summons*; R. S. C., June, 1889, Order LV.

Appointment of new trustees by the Court.

an express power to appoint new trustees contained in the instrument, by which the trust was created (*x*). As trusts were generally instituted for the benefit of married women and children, who, as we shall see (*y*), were not *sui juris*, it was the practice, until the year 1860, to insert such an express power in every well-drawn deed or will creating a trust (*z*). In 1860, an Act passed giving a statutory power to appoint new trustees, which, however, was applicable only in case of instruments executed after the Act (*a*). But the Conveyancing Act of 1881 (*b*) substituted provisions for the appointment of new trustees applicable to trusts created either before or after its commencement; and these provisions are now re-enacted in the Trustee Act, 1893 (*c*). Under this Act, where a trustee is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose (*d*) by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee (*e*)

rule 13a: W. N., 29th June, 1889. The Court may appoint a new trustee in the place of a trustee convicted of felony, or adjudged bankrupt: stat. 56 & 57 Vict. c. 53, s. 25, replacing 15 & 16 Vict. c. 55, s. 9; 46 & 47 Vict. c. 52, s. 147. Since 1860, trustees appointed by the Court have had the same powers in all respects as the original trustees: stat. 56 & 57 Vict. c. 53, s. 37, replacing 44 & 45 Vict. c. 41, s. 33; 23 & 24 Vict. c. 145, s. 27; Wms. Conv. Stat., 181.

(*x*) See Lewin on Trusts, 534 *sq.*, 690 *sq.*, 6th ed.; 764 *sq.*, 1031 *sq.*, 10th ed.

(*y*) *Post*, ch. xii.

(*z*) Davidson, Prec. Conv. vol. iii., pp. 228, 721, 3rd ed.; Williams Real Prop., 176, 13th ed.

(*a*) Stat. 23 & 24 Vict. c. 145, ss. 27, 34; passed 28th Aug., 1860.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 31.

(*c*) Stat. 56 & 57 Vict. c. 53, s. 10. These provisions may be excluded or varied by the terms of the instrument creating the trust; see sub-s. 5.

(*d*) See *Re Wheeler & De Rochow*, 1896, 1 Ch. 315.

(*e*) Including a refusing or retiring trustee, if willing to act in appointing a new one; s. 10, sub-s. (4).

for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint a new trustee or new trustees. Every new trustee so appointed is at once invested with the same powers as an original trustee (*f*). On an appointment of a new trustee, the number of trustees may be increased. It is not obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but in the latter case, there must be at least two trustees to perform the trust (*g*).

Retirement of trustee.

Formerly a person could only retire and be discharged from a trust once accepted—(1) with the concurrence of all the *cestui que trusts* being *sui juris*; (2) under the authority of the Court of Chancery; or (3) by the appointment under an express or statutory power of a new trustee in his place (*h*). But now, by the Trustee Act, 1893 (*i*), replacing a provision of the Conveyancing Act of 1881 (*k*), where there are *more than two* trustees, a trustee may retire and be discharged from the trust, without any new trustee being appointed in his place, upon his declaring by deed his desire to be discharged, and his co-trustees, and such other person, if any, as may be empowered to appoint trustees, consenting by deed to his discharge.

Vesting trust property in new trustees.

The mere appointment of a new trustee does not give him the legal estate in the lands subject to the trust; and it was formerly necessary for the persons who were

(*f*) Sect. 10. sub-s. (3).

(*g*) Sect. 10. sub-s. (2). An appointment of a new trustee is charged with a stamp duty of 10*s.*; stat. 54 & 55 Vict. c. 39, s. 1. & 1st schedule, replacing 33 & 34 Vict. c. 97, schedule.

(*h*) See Lewin on Trusts, 534 *sq.*, 6th ed.; 764 *sq.*, 10th ed.

(*i*) Stat. 56 & 57 Vict. c. 53, s. 11, the provisions of which may be excluded or varied by the terms of the instrument creating the trust; see sub-s. 3.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 32.

trustees when the appointment was made, to execute a conveyance of their estate in any land subject to the trust to the new trustee and the continuing trustees (*l*).

May be now made simply by a declaration.

In deeds of appointment of a new trustee and of discharge of a retiring trustee executed after the year 1881, the estate in any land subject to the trust may be vested in the future trustees simply by a declaration to that effect made by the proper persons without any conveyance. For, by the Trustee Act, 1893 (*m*), replacing a provision of the Conveyancing Act of 1881 (*n*), where a deed by which a new trustee is appointed contains a declaration *by the appointor* to the effect that any estate or interest in any land subject to the trust shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance, operate to vest that estate or interest in those persons as joint tenants and for the purposes of the trust. And where a deed, by which a retiring trustee is discharged under the same Act, contains a similar declaration *by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees*, that declaration shall, without any conveyance, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate and interest to which the declaration relates (*o*).

Vesting orders.

It is not always possible to obtain the concurrence of the person entitled to the legal estate in land subject to a trust, when it is wished to vest the estate in new

(*l*) See *Warburton* v. *Sandys*, 14 Sim. 622.

(*m*) Stat. 56 & 57 Vict. c. 53, s. 12.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 34.

(*o*) These provisions do not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust: stat. 56 & 57 Vict. c. 53, s. 12, sub-s. (3). A conveyance of property made for effectuating the appointment of a new trustee is charged with a stamp duty of 10*s.*; see stat. 54 & 55 Vict. c. 39, s. 62, replacing 33 & 34 Vict. c. 97, s. 78; *Hadgett* v. *Commissioners of Inland Revenue*, 3 Ex. D. 46; *ante*, p. 191, n. (*g*).

trustees. Provision has, therefore, been made by statute (*p*), that in certain cases an order of Court may be made vesting any lands subject to a trust in such persons and for such estate as shall be directed. Such an order may be obtained if the person seised or possessed of lands on trust be a lunatic, or an infant, or out of the jurisdiction or not to be found, or refuse to convey, and in one or two other cases; and the order has the effect of a conveyance (*q*). It must now be made, in the case of lunacy, by the Judge in Lunacy (*r*); in other cases, in the Chancery Division (*s*). A similar order may be made, vesting lands in the future trustees, on or after an appointment of new trustees by the Court (*t*). Since 1865, the County Courts have had the jurisdiction of the Court of Chancery to enforce the execution of trusts and under the Trustee Acts, in cases concerning trust property to the value of £500 (*u*).

County Courts.

The Judicial Trustees Act, 1896 (*x*), empowers the Court (*y*), on the application of a person creating or intending to create a trust or of a trustee or beneficiary, to appoint a judicial trustee of the trust (who is to be subject to the control and supervision of the Court as an officer thereof, and may be remunerated), either

Judicial trustee.

(*p*) Stats. 53 Vict. c. 5, s. 135; 56 & 57 Vict. c. 53, s. 26, replacing 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55, which replaced 11 Geo. IV. & 1 Will. IV. c. 60, 4 & 5 Will. IV. c. 23, and 1 & 2 Vict. c. 69.

(*q*) See stats. 53 Vict. c. 5, s. 135 (3); 56 & 57 Vict. c. 53, s. 32. The order is chargeable with stamp duty as a conveyance; *ante*, note (*o*).

(*r*) See stat. 53 Vict. c. 5, ss. 135, 342; Rules in Lunacy, 1890, Nos. 55—57; W. N. 26th July, 1890.

(*s*) *Ante*, p. 164. But such orders may be made as to lands in the counties of Lancaster or Durham, by the Chancery Courts of those counties; stat. 56 & 57 Vict. c. 53, s. 46.

(*t*) Stat. 56 & 57 Vict. c. 53, s. 26; *ante*, p. 189, n. (*u*).

(*u*) Stats. 56 & 57 Vict. c. 53, s. 46; 51 & 52 Vict. c. 43, s. 67, replacing 28 & 29 Vict. c. 99, s. 1; 30 & 31 Vict. c. 142, s. 9.

(*x*) Stat. 59 & 60 Vict. c. 35, s. 1, which came into operation on the 1st May, 1897.

(*y*) That is, the High Court, a Palatine Court as respects trusts within its jurisdiction, or any county court judge to whom the jurisdiction may be assigned; sect. 2.

jointly with any other person or a sole trustee, and, if sufficient cause is shewn, in the place of all or any of the existing trustees.

It remains to add that, though the Judicature Acts provided for the direct recognition and enforcement of equitable rights in the courts thereby established, which are courts of law as well as of equity (*z*), they have not altered the nature of an equitable estate (*a*). The terms *legal* and *equitable* estate are still in use; and the legal estate in lands may still be vested in some other person than the beneficial owner. Every purchaser of landed property has, therefore, a right to a good title both at law and in equity; and if the legal estate should be vested in a trustee, or any person other than the vendor, the concurrence of such trustee or other person must be obtained for the purpose of vesting the legal estate in the purchaser, or, if he should please, in a new trustee of his own choosing. When a person has an estate at law, and does not hold it subject to any trust, he has of course the same estate in equity, but without any occasion for resorting to its aid. To him, therefore, the doctrine of trusts does not apply: his legal title is sufficient; the law declares the nature and incidents of his estate, and equity has no ground for interference (*b*).

Legal estate.

We shall now take leave of equity and equitable estates, and proceed, in the next chapter, to explain a modern conveyance.

(*z*) *Ante*, p. 164.

(*a*) *Clements* v. *Matthews*, 11 Q. B. D. 808, 814; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, *ib.*, 288; see *ante*, pp. 178, 179.

(*b*) See *Brydges* v. *Brydges*, 3 Ves. 127.

CHAPTER VIII.

OF A MODERN CONVEYANCE.

Lease and release.

In modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and for every such transaction, two deeds were always required. From that time to the year 1845, the ordinary method of conveyance was a release merely, or, more accurately, a release made in pursuance of the Act (*a*) for rendering a release as effectual as a lease and release. The object of this Act was merely to save the expense of two deeds to every purchase, by rendering the lease unnecessary. Since 1845 freeholds have been transferable by deed of grant alone (*b*). But as a lease and release was so long the usual method of conveyance, the nature of a conveyance by lease and release should still form a subject of the student's inquiry; and with this we will accordingly begin.

Release.

A lease for years.

It has been already explained (*c*) that, in the view of the early law, a lease of land for a term of years was a matter of contract rather than of transfer of property; and, for the purpose of an action for the recovery of the land, the possession of the lessee was that of a mere bailiff for his lessor, who remained seised of the freehold. Still, after a lessee for years had actually entered into possession of the land under his lease—and entry, in ancient times, was absolutely necessary to make a

(*a*) Stat. 4 & 5 Vict. c. 21, repealed by stat. 37 & 38 Vict. c. 96.

(*b*) Stats. 7 & 8 Vict. c. 76, ss. 2. 13; 8 & 9 Vict. c. 106, s. 2.

(*c*) *Ante*, pp. 16, 17. 23, 63.

complete lease (*d*)—the relative position of the parties was substantially altered. The lessor's proprietary interest in the land, though technically it remained a freeholding, was divorced from actual possession; thus it became a mere right, an incorporeal hereditament (*e*). If, therefore, the lessor wished to transfer his proprietary right to the lessee, a feoffment with livery of seisin would have been out of place between them; for the essential part of this mode of assurance was the transfer of actual possession made by the livery of seisin; and it was impossible to transfer to the lessee the actual possession which he already enjoyed (*f*). In this case it is obvious that the end desired was the transfer of a right to land, without the possession of anything corporeal; and, as we have seen, the common law required this to be accomplished by the delivery of a sealed writing, that is, by deed (*g*). And a deed by which a freeholder conveyed all his estate in land to one who was in actual possession thereof with his privity, was termed a release (*h*). To a lease and release of this kind, it is obvious that the same objection applies as to a feoffment: the inconvenience of actually going on the premises is not obviated; for the tenant must enter before he can receive the release. In the very early periods of our history, this kind of circuitous conveyance was, however, occasionally used. A lease was made for one, two, or three years, completed by the actual entry of the lessee for the express purpose of enabling him to receive a release of the inheritance, which was accordingly made to him a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by feoffment (*i*). But a lease and release

A release.

Inconvenience of lease with entry.

(*d*) Litt. s. 459; Co. Litt. 270 a.
(*e*) See *ante*, pp. 5, 30.
(*f*) Litt. s. 460; Gilb. Uses, 103 (223, 3rd ed.).
(*g*) *Ante*, p. 31.
(*h*) Litt. ss. 444—461; Co. Litt. 270 b, 271 a.
(*i*) 2 Saund. Uses, 61 (74, 5th ed.).

would never have obtained the prevalence they afterwards acquired had not a method been found out of making a lease, without the necessity of actual entry by the lessee.

The Statute of Uses (*k*) was the means of accomplishing this desirable object. This statute, it may be remembered, enacts, that when any person is seised of lands to the use of another, he that has the use shall be deemed in lawful seisin and possession of the lands, for the same estate as he has in the use. Now we have seen (*l*) that, before the Statute of Uses, if a bargain were made for the sale of an estate, and the purchase-money paid, but no feoffment were executed to the purchaser, the Court of Chancery considered that the estate ought in conscience immediately to belong to the person who paid the money, and, therefore, held the bargainor or vendor to be immediately seised of the lands in question *to the use* of the purchaser (*m*). This proper and equitable doctrine of the Court of Chancery had rather a curious effect when the Statute of Uses came into operation; for, as by means of a contract of this kind the purchaser became entitled to the *use* of the lands, so, after the passing of the statute, he became at once entitled, on payment of his purchase-money, to the lawful seisin and possession: or rather, he was deemed really to have, by force of the statute, such seisin and possession, so far at least as it was possible to consider a man in possession, who in fact was not (*n*). It consequently came to pass that the seisin was thus transferred from one person to another, by a mere *bargain and sale*, that is, by a contract for sale and payment of money without the necessity of a feoffment, or even of a deed (*o*).

The Statute of Uses.

Bargain and sale.

(*k*) 27 Hen. VIII. c. 10.
(*l*) *Ante*, p. 169.
(*m*) 2 Sand. Uses, 43 (53, 5th ed.); Gilb. Uses, 49 (94, 3rd ed.).
(*n*) *Ante*, p. 172 & n. (*l*).
(*o*) Dyer, 229 a; Com. Dig., Bargain and Sale (B. 1. 4); Gilb. Uses, 87, 271 (179, 475, 3rd ed.).

The mischievous results of the statute, in this particular, were quickly perceived. The notoriety in the transfer of estates, on which the law had always laid much stress, was at once at an end; and it was perceived to be very undesirable that so important a matter as the title to landed property should depend on a mere verbal bargain and money payment, or *bargain and sale*, as it was termed. Shortly after the passing of the Statute of Uses, it was accordingly required by another Act of Parliament (*p*), passed in the same year, that every bargain and sale of any estate of inheritance or freehold should be made by deed indented and enrolled, within six months (which means lunar months) from the date, in one of the Courts of Record at Westminster, or before the *custos rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands lay, or two of them at least, whereof the clerk of the peace should be one. A stop was thus put to the secret conveyance of estates by mere contract and payment of money. For a deed entered on the records of a court is of course open to public inspection; and the expense of enrolment was, in some degree, a counterbalance to the inconvenience of going to the lands to give livery of seisin. It was not long, however, before a loophole was discovered in this latter statute, through which, after a few had ventured to pass, all the world soon followed. It was perceived that the Act spoke only of estates of *inheritance or freehold*, and was silent as to bargains

Bargains and sales required to be by deed enrolled.

A loophole discovered in the statute.

Before the Statute of Uses a bargain and sale of lands would raise a use of the estate in fee simple, without mention of the bargainee's heirs; for it was presumed that the purchase-money was paid for the whole of the bargainor's estate. But since the Statute it has been considered that a bargain and sale of lands to one simply, without mentioning his heirs, will only give him a life estate at law under the Statute; 1 Rep. 87 b; Gilb. Uses, 18, 62, 76 & n., 239; 1 Sand. Uses, 122.

(*p*) 27 Hen. VIII. c. 16. Deeds of bargain and sale may now be enrolled in the Central Office of the Supreme Court: stats. 36 & 37 Vict. c. 66, ss. 16, 17; 42 & 43 Vict. c. 78; R. S. C., 1883, Order LXL., rule 9.

and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only was not therefore affected by the Act (*q*), but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law (*r*), was supplied by the Statute of Uses; which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and sold to him (*s*). And as any pecuniary payment, however small, was considered sufficient to raise a use (*t*), it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here, then, was an opportunity of making a conveyance of the whole fee simple, without livery of seisin, entry or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by *lease and release*—a method which was first practised by Sir Francis Moore, serjeant-at-law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate (*u*); and although the efficiency of this method was at first doubted (*x*), it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease as

Bargain and sale for a year.

Lease and release.

(*q*) Gilb. Uses, 98, 296 (214, 502, 3rd ed.); 2 Sand. Uses, 63 (75, 5th ed.).
(*r*) *Ante*, pp. 156, 197.
(*s*) Gilb. Uses, 104 (223, 3rd ed.).
(*t*) 2 Sand. Uses, 47 (57, 5th ed.).
(*u*) 2 Prest. Conv. 219.
(*x*) Sugd. note to Gilb. Uses, 328; 2 Prest. Conv. 231; 2 Foub. Eq. 12.

it was called) for a year derived its effect from the Statute of Uses; the release was quite independent of that statute, having existed long before, and being as ancient as the common law itself (*y*). The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds (*z*), it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter (*a*). On a conveyance by release from a freeholder in fee to his lessee for years in possession of the land, whether by entry or under the Statute of Uses, it was as necessary as it was in a feoffment, that the estate to be taken by the latter should be duly marked out; so that he would take no fee, even though the lessor released *all his estate* to him, unless the estate were released to him and his heirs (*b*).

Bargain and sale for a year must be in writing.

The estate must have been marked out.

(*y*) Sugd. note to Gilb. Uses, 229.

(*z*) Stat. 29 Car. II. c. 3: *ante*, p. 153.

(*a*) See Appendix (A) for the forms of deeds of lease and release.

(*b*) Litt. s. 465; see *ante*, p. 146.

This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the Act was passed to which we have before referred (*c*). This Act provided that every deed of release of a freehold estate, which should be expressed to be made in pursuance of the Act, should be as effectual as if the releasing party had also executed, in due form, a lease for a year, for giving effect to such release, although no such lease for a year should be executed.

Act abolishing the lease for a year.

In the year 1845, it was provided by the Real Property Act (*d*) that after the 1st of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to *lie in grant* as well as in livery. We have seen that, at common law, corporeal hereditaments were said to lie in livery, as being transferable by delivery of possession; while incorporeal hereditaments were said to lie in grant, because a deed of grant was required to convey them, if desired to be transferred apart from the possession of anything corporeal (*e*). Since this enactment, therefore, a simple deed of grant has been sufficient for the transfer of all freehold estates in possession, or corporeal hereditaments (*f*). And the method so introduced of conveying freeholds by deed of grant has ever since superseded all others in practice.

Real Property Act, 1845.

The freehold possession or legal seisin being thus capable of being transferred by a deed of grant, there is the same necessity now as there was when a feoffment or release was employed, that the estate which the

The estate taken must be marked out.

(*c*) Stat. 4 & 5 Vict. c. 21, repealed as obsolete by stat. 37 & 38 Vict. c. 96; *ante*, p. 195.

(*d*) Stat. 8 & 9 Vict. c. 106, s. 2. This Act repealed stat. 7 & 8 Vict. c. 76, ss. 2, 13, providing that after the year 1844 freehold land might be conveyed by deed without livery of seisin or a prior lease.

(*e*) *Ante*, p. 31.

(*f*) *Ante*, p. 30.

purchaser is to take should be marked out (*g*). In deeds executed after the year 1881, however, it is sufficient, in the limitation of an estate in fee simple, to use the words *in fee simple*, without the word *heirs*; and in the limitation of an estate in tail, to use the words *in tail*, without the words *heirs of the body*; and in the limitation of an estate in tail male or in tail female, to use the words *in tail male* or *in tail female*, as the case requires, without the words *heirs male of the body* or *heirs female of the body* (*h*). These expressions were authorized by the Conveyancing Act of 1881. But this Act did not abolish the necessity for using proper words of limitation. It is considered, therefore, that at the present day the limitation by deed of estates in fee or in tail must be made, either by making use of the old words of inheritance or procreation (*i*), as *heirs*, *heirs of the body*, &c., or else by employing the exact expressions mentioned in the Act. Thus if a man has purchased an estate in fee simple, the conveyance must be expressed to be made to him *and his heirs*, or to him *in fee simple*; for the construction of all conveyances, wills only excepted, is in this respect the same; and a conveyance to the purchaser simply, without these words, would merely convey to him an estate for his life, as in the case of a feoffment (*k*). It should be noted that, although the Land Transfer Act, 1897 (*l*), now causes estates in fee simple to devolve on the tenant's death to his executors or administrators in the first instance like chattels real, yet it has not destroyed the beneficial title of his heir in case of his intestacy; and there remains the same necessity as there was before of effectually limiting an hereditary estate upon the grant of a fee simple (*m*). And it does not appear

(*g*) Shep. Touch. 327; *ante*, p. 145.
(*h*) Stat. 44 & 45 Vict. c. 41, s. 51.
(*i*) *Ante*, p. 145.
(*k*) Shep. Touch. 327.
(*l*) Stat. 60 & 61 Vict. c. 65, Part I., *ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187.
(*m*) *Ante*, pp. 145—147.

that the Act gives any greater force or effect than the common law allowed to a grant of lands to a man, *his executors, administrators or assigns;* which grant conferred a life estate only (*n*). In the case of a grant also, as well as in a feoffment, it is the better opinion that, in order to give permanent validity to the conveyance, it is necessary either that a consideration should be expressed in the conveyance, or that it should be made *to the use of* the purchaser as well as *unto* him (*o*): for a lease and release was formerly, and a deed of grant is now, as much an established conveyance as a feoffment; and the rule was, before the Statute of Uses, that any *conveyance*, and not a feoffment particularly, made to another without any consideration, or any declaration of uses, should be deemed to be made *to the use* of the party conveying. In order, therefore, to avoid any such construction, and so to prevent the Statute of Uses from

Conveyance made unto *and to the use of* the purchaser.

(*n*) 1 Prest. Estates, 30: *Re Bird's Trusts*, 3 Ch. D. 214. It may perhaps be argued that, as the Land Transfer Act, 1897, has altered the rule of law respecting the devolution of an estate in fee simple and vests the same in the tenant's personal representatives on his death, the Court ought now to give effect to words purporting to limit the estate according to the course prescribed by law. But the law knows no freehold estate passing to executors, administrators or assigns, and not to heirs. And it is submitted that the law still requires that on a grant of lands by deed an estate known to the law shall be duly conferred on the grantee; that what is essential to give an estate in fee simple is still to express in the recognized legal terms (that is, by the words *heirs* or *in fee simple*) an intention to confer an hereditary estate; that unless the lands be so given to the grantee's heirs, the grantee himself can take no estate in fee; and that devolution to the personal representatives, like assignability, is but an incident of such an estate when duly created: see *ante*, pp. 65—69, 146. There is no doubt whatever that, as a matter of conveyancing practice, the proper way to confer an estate in fee simple remains the same. As we have seen (*ante*, p. 189), since the Conveyancing Act of 1881, fee simple estates held by a sole or sole surviving trustee have passed on his death to his personal representatives. But it has always been admitted that this has not done away with the necessity of limiting lands to trustees and their heirs, or to them in fee simple, in order to confer on them an estate in fee simple: 1 Key & Elphinstone, Prec. Conv. 130, n. (*d*). 4th ed.; Davidson's Concise Precedents, 64, 123—124, 157, n. (*e*). 483, 17th ed.; Wolstenholme's Conveyancing Acts, 89, 8th ed.

(*o*) 2 Sand. Uses, 64—69 (77—84, 5th ed.); Sugd. note to Gilb. Uses, 233; see *ante*, pp. 148, 169, 172.

immediately undoing all that has been done, it is usual to express, in every conveyance, that the purchaser shall hold, not only unto, but unto *and to the use of* himself and his heirs.

A conveyance may be made to uses.

A conveyance might also have been made by lease and release, as well as by a feoffment, to one person and his heirs *to the use* of some other person and his heirs; and, in this case, as in a similar feoffment, the latter person took at once the whole fee simple, the former serving only as an instrument to enable the Statute of Uses to execute the estate to him (*p*). This extraordinary result of the Statute of Uses is continually relied on in modern conveyancing; and it may now be accomplished by a deed of grant in the same manner as it might have been before effected by a lease and release. It has been found particularly advantageous as a means for avoiding a rule of law, that a man cannot make any conveyance to himself; thus if it were wished to make a conveyance of lands from A., a person solely seised, to A. and B. jointly, this operation could not, before the Statute of Uses, have been effected by less than two conveyances: for a conveyance from A. directly to A. and B. would have passed the whole estate solely to B. (*q*). It would, therefore, have been requisite for A. to make a conveyance to a third person, and for such person then to re-convey to A. and B. jointly. And this was the method actually adopted, under similar circumstances, with respect to leasehold estates and personal property, which are not effected by the Statute of Uses, until an Act of 1859 enabled any person to assign leasehold or personal property to himself jointly with another (*r*); but this Act did not extend to freeholds.

A man cannot convey to himself alone.

(*p*) See *ante*, p. 171.

(*q*) Perkins, s. 203. So a man cannot covenant to pay money to himself and another on a joint account: *Faulkner* v. *Lowe*, 2 Ex. 595.

(*r*) Stat. 22 & 23 Vict. c. 35, s. 21: see Wms. Conv. Stat. 224.

If the estate were freehold, previously to the year 1882. A. must have conveyed to B. and his heirs, to the use of A. and B. and their heirs; and a joint estate in fee simple would have immediately vested in them both. In conveyances made after 1881, the like result may be obtained without the aid of the Statute of Uses. For by the Conveyancing Act of 1881 (*s*), freehold land may now be conveyed by a person *to himself jointly with another person* by the like means by which it might be conveyed by him to another person. But this enactment does not enable a man to make any conveyance to himself otherwise than *jointly with another person*. Suppose, then, a person should wish to convey a freehold estate to another, reserving to himself a life interest,—without the aid of the Statute of Uses he would be unable to accomplish this result by a single deed (*t*). But, by means of the statute, he may make a conveyance of the property to the other and his heirs, *to the use* of himself (the conveying party) for his life, and from and immediately after his decease, *to the use* of the other and his heirs and assigns, or in fee simple (*u*). By this means the conveying party will at once become seised of an estate only for his life, and after his decease an estate in fee simple will remain for the other.

But a man may now convey freeholds to himself *jointly with another*:

and may convey to another to his own use.

The consideration of the form of a deed of grant is reserved for a subsequent chapter (*x*). But it may be a help to the student to turn to that chapter now, and peruse the precedents of purchase deeds there given. He may not see the reason for every expression used in these deeds; but he will understand the gist of them; and it will quicken the knowledge he has already acquired to see how a grant of land is made in practice.

Form of a grant.

(*s*) Stat. 44 & 45 Vict. c. 41, s. 50; Wms. Conv. Stat. 223.

(*t*) Perk. ss. 704, 705; *Poole* v. *Jones*, 13 M. & W. 534.

(*u*) See *ante*, pp. 145, 202.

(*x*) *Post*, Part VI.

Conveyance of lands in Middlesex and Yorkshire.

In order to make a complete and unavoidable conveyance of lands situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull) a memorial of the deed of conveyance must be duly registered in the county register. The registration of deeds affecting lands in these counties was rendered necessary by statutes of the reigns of Anne and George II. (*y*). These Acts provided that all deeds should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deeds were duly registered before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee should claim. The Courts of Equity, however, held that a purchaser or mortgagee of land in a register county, who had had clear previous notice of a prior unregistered assurance affecting the same land, and yet registered his own deed before the other, should not be permitted to gain any priority over the persons claiming under the previous assurance with regard to the *equitable* estate in the land; but should hold the *legal* estate which he acquired by priority of registration, as a trustee for such other persons (*z*). And this doctrine of equity still prevails with respect to land in Middlesex. But with respect to land in Yorkshire and Kingston-upon-Hull, it is now enacted in the Yorkshire Registries Act, 1884 (*a*), which has

Notice of unregistered assurance.

(*y*) Stat. 7 Anne, c. 20, for Middlesex: the Act does not extend to chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery (s. 17), and has no application to the City of London; Sug. V. & P. 732. The Middlesex register was transferred to the Land Registry Office by stat. 54 & 55 Vict. c. 64; see Rules thereunder, W. N., 13th Feb., 1892. Stats. 2 & 3 Anne, c. 4; 6 Anne, c. 20 (5 Anne, c. 18, in Ruffhead), for the West Riding of Yorkshire; 6 Anne, c. 62 (6 Anne, c. 35, in Ruffhead), for the East Riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the North Riding. All the Yorkshire Acts were repealed and replaced by stat. 47 & 48 Vict. c. 54. The deeds must be first duly stamped; stat. 54 & 55 Vict. c. 39, s. 17, replacing 33 & 34 Vict. c. 97, s. 22.

(*z*) See Wms. Conv. Stat. 23; *Le Nere* v. *Le Nere*, 2 White & Tudor, Leading Cases in Equity, 32, 45—48, 5th ed.; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *ante*, p. 178.

(*a*) Stat. 47 & 48 Vict. c. 54,

repealed and replaced the former Registry Acts for those places, that all assurances (*b*) affecting lands in those places *may be* registered under the Act; and that all assurances entitled to be registered under this Act shall have priority according to the date of registration (*c*); and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests, shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud (*d*). This enactment appears to displace the former doctrine of equity with regard to lands in Yorkshire, thus rendering registration even more essential than before. Conveyances of lands forming part of the great level of the fens, called Bedford Level, are also required to be registered in the Bedford Level Office (*e*); but the construction which has been put on the statute, by which such registration is required, prevents any priority of interest from being gained by priority of registration (*f*).

Bedford Level.

The Land Transfer Act, 1897 (*g*), provided that the Queen may by Order in Council declare, as respects any county or part of a county mentioned or defined in the Order, that, on and after a day specified in the Order, registration of title to land is to be compulsory on sale,

Lands in a district where registration of title is compulsory on sale.

ss. 4, 14, as amended by stat. 48 & 49 Vict. c. 26, s. 4.

(*b*) See *Rodger* v. *Harrison*, 1893, 1 Q. B. 161.

(*c*) By Stat. 48 & 49 Vict. c. 26, s. 3, a *caveat* in favour of any person may be registered with respect to any lands in Yorkshire by any person claiming to be entitled to any interest therein; and if, while the *caveat* remains in force, an assurance of the lands from the giver of the *caveat* to the other, his representatives or assigns, be duly registered, such assurance shall have priority as though it had been registered on the date of registration of the *caveat*.

(*d*) See *Battison* v. *Hobson*, 1896, 2 Ch. 403.

(*e*) Stat. 15 Car. II. c. 17, s. 8.

(*f*) *Willis* v. *Brown*, 10 Sim. 127.

(*g*) Stat. 60 & 61 Vict. c. 65, s. 20.

and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land. An Order in Council has since been made under this provision with respect to the county and city of London (*h*). When, therefore, a conveyance on sale of lands there situate has been or shall be executed on or after the day on which the Order took effect with respect to them, the same does not pass the legal estate in such lands to the grantee unless or until he is duly registered as the proprietor thereof under the Land Transfer Acts, 1875 and 1897 (*i*). Registration of title under these Acts and the means of conveying registered land are explained in a subsequent part of this book (*k*). The above stated provision of the Act of 1897 does not appear to affect any other conveyance of lands situate in the district, to which the Order applies, than a conveyance on sale (*l*), or in the case of a sale to prevent the equitable estate in the lands sold from passing to the purchaser (*m*). Lands situate within the jurisdiction of the Middlesex Registry (*n*) become exempt from such jurisdiction on being registered under the Land Transfer Acts, 1875 and 1897, and no document relating to such

(*h*) See W. N., 23rd July, 1898, 29th Oct., 1898, 9th Dec., 1899. The Order took effect at different dates from the 1st Jan., 1899, to the 1st Nov., 1900, as to various parts of the county of London, and will come into operation as to the city of London on the 1st May, 1901. As to what is the county of London, see stats. 51 & 52 Vict. c. 41, ss. 40, 100; 18 & 19 Vict. c. 120, Sched. A, B. & C.

(*i*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*k*) *Post*, Part VII.

(*l*) Sale is the conveyance of lands or other property in consideration of the payment of a price in money. A conveyance of lands by way of exchange, partition, family settlement, voluntary gift, or mortgage is not a conveyance on sale. See *Coats* v. *Commissioners of Inland Revenue*, 1897, 1 Q. B. 778, 783; *Payne* v. *Cork Co., Ltd.*, 1900, 1 Ch. 308, 314; *McQueen* v. *Farquhar*, 11 Ves. 467; *ante*, pp. 78, 100, 102, 117, 141, 156; *post*, Part IV., ch. ii.

(*m*) *Ante*, p. 182.

(*n*) See *ante*, p. 206, n. (*y*). Lands taken in 1888 from Middlesex to make up the county of London remained subject to this jurisdiction; see above, n. (*h*).

lands and executed after such registration need be registered in the county register (*o*).

A lease and release was said to be an innocent conveyance; for when, by means of the lease and the Statute of Uses, the purchaser had once been put into possession, he obtained the fee simple by the release; and a release never operates by wrong, as a feoffment occasionally did (*p*), but simply passes that which may lawfully and rightly be conveyed (*q*). The same rule is applicable to a deed of grant (*r*). Thus, if a tenant merely for his own life should, by a lease and release, or by a grant, purport to convey to another an estate in fee simple, his own life interest only would pass, and no injury would be done to the reversioner. The word *grant* is the proper and technical term to be employed in a deed of grant (*s*), but its employment is not absolutely necessary: for it has been held that other words indicating an intention to grant will answer the purpose (*t*). And by the Conveyancing Act of 1881 (*u*), it is declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

Lease and release an innocent conveyance.

So a grant.

Word *grant*.

It will be seen then that the conveyance of a freehold estate at law is still a formal matter: though the chief requisite in this respect is now a deed, and not delivery of possession, as was the case at common law (*x*). Nor will an informal expression of intention ever suffice to transfer a legal estate of freehold (*y*). Since it was enacted in 1845 that corporeal hereditaments should

Conveyance of freeholds still a formal matter.

(*o*) Stat. 38 & 39 Vict. c. 87, s. 127; 54 & 55 Vict. c. 64. First Sched. § 14; Land Transfer Rules. 1898. r. 24.

(*p*) *Ante*, p. 147.

(*q*) Litt. s. 600.

(*r*) Litt. ss. 616, 617.

(*s*) Shep. Touch. 229.

(*t*) *Shore* v. *Pincke*. 5 T. R. 124; *Haggerston* v. *Hanbury*. 5 B. & C. 101.

(*u*) Stat. 44 & 45 Vict. c. 41. s. 49.

(*x*) *Ante*, p. 144.

(*y*) *Ante*, p. 143. As to the effect which such expressions

lie in grant as well as in livery, it has been the regular practice to convey freeholds by deed of grant (*z*). It should be noted, however, that other methods of conveyance may still be employed, though in practice they seldom are. Thus a feoffment with livery of seisin may still be made. But as a feoffment must now be evidenced by deed, unless made by an infant under a custom (*a*), it would only give extra trouble to use it. A feoffment by an infant under the custom of gavelkind (*b*) is perhaps the only case in which this mode of assurance is now used in practice. In this case the freehold may be conveyed without deed; but the feoffment must be put into writing and signed by the infant to satisfy the Statute of Frauds (*c*); and formal livery of seisin must be made by the infant in person (*d*). So an estate in fee simple may be conveyed by deed of bargain and sale duly enrolled pursuant to the statute of Henry VIII. already mentioned (*e*). But this assurance is now hardly ever employed (*f*): though it has the advantage that an office copy of the inrolment of a bargain and sale is as good evidence as the original deed (*g*). When a bargain and sale is employed, the whole legal estate in fee simple passes, as we have seen (*h*), by means of the Statute of Uses,—the bargainor

Feoffment.

Bargain and sale.

may have in equity, see *ante*, pp. 181, 182, 186.

(*z*) Davidson, Prec. Conv. vol. ii., part i., p. 176, 4th ed.

(*a*) *Ante*, p. 154.

(*b*) *Ante*, p. 59.

(*c*) *Ante*, p. 154.

(*d*) Davidson, Prec. Conv. vol. ii., part i., pp. 177, 244, 4th ed. See *Re Maskell and Goldfinch's Contract*, 1895, 2 Ch. 525.

(*e*) *Ante*, p. 198. In some cities and boroughs the inrolment of bargains and sales is made by the mayors or other officers: stat. 27 Hen. VIII. c. 16, s. 2. Of lands in the counties of Lancaster or Durham it may be made in the Lancaster or Durham Court of Chancery: stat. 5 Eliz. c. 26, which also permitted inrolment in the palatine courts of Chester, until they were abolished by 11 Geo. IV. and 1 Will. IV. c. 70. Under the old Yorkshire Registry Acts, inrolment might be made in the county registers: 5 & 6 Anne, c. 18, s. 1; 6 Anne, c. 35, ss. 16, 17, 34: 8 Geo. II. c. 6, s. 21; but no similar provisions are contained in the Yorkshire Registries Act, 1884.

(*f*) Davidson, Prec. Conv. vol. ii., part i., p. 179, 4th ed.

(*g*) Stat. 10 Anne, c. 28 (c. 18 in Ruffhead), s. 3.

(*h*) *Ante*, pp. 197, 198, & n. (*o*).

becoming seised to the use of the bargainee and his heirs. A bargain and sale, therefore, cannot, like a lease and release, or a grant, be made to one person to the use of another; for, the whole force of the Statute of Uses is already exhausted in transferring the legal estate in fee simple to the bargainee: so that the use declared would be a use upon a use, void at law, though valid in equity (*i*). Similar to a bargain and sale is another method of conveyance occasionally, though very rarely employed, namely, a *covenant to stand seised* of land to the use of another, in consideration of blood or marriage. This is also an assurance by means of the Statute of Uses; for when such a covenant is made, the legal estate in the land passes at once to the covenantee under the Statute. No inrolment of the deed of covenant is necessary; for the statute requiring the inrolment of bargains and sales extends only to bargains for valuable consideration, which the consideration of relationship by blood or marriage is not (*k*). This is perhaps the only instance in which such a consideration is of any effect in law (*l*). And it may be noted that a deed, in which such a consideration is expressed, may take effect as a covenant to stand seised, though it be in the form of a grant or other assurance (*m*). Again, a release is still an appropriate method of conveying an estate from a freeholder to any one, who with his privity is in actual possession of the land, either by entry or under the Statute of Uses (*n*). And a confirmation by the rightful owner of land to any one, who is actually possessed of it, has the same effect as of old (*o*). But, as has been explained, these are properly cases of the conveyance of

Bargain and sale cannot be made to one person to the use of another.

Covenant to stand seised.

Release.

Confirmation.

(*i*) *Ante*, pp. 176, 177.

(*k*) An intended marriage is a valuable consideration, but not the mere fact of relationship by marriage.

(*l*) Wms. Pers. Prop. 159, n. (*q*). 15th ed.

(*m*) See *Doe* d. *Daniell* v. *Woodroffe*, 10 M. & W. 608: *Doe* d. *Starling* v. *Prince*, 15 Jur. 632; Prest. Abst. i. 70—72, iii. 121, 122, 187; Williams on Seisin, 145.

(*n*) *Ante*, pp. 156, 196.

(*o*) *Ante*, p. 156.

incorporeal hereditaments, which always lay in grant (*p*). So that a deed expressed in terms of grant might always take effect as a release or confirmation (*q*). Of course, now that corporeal hereditaments lie in grant as well as incorporeal, it would be purely superfluous to gain possession under a lease, or to make an entry, for the mere purpose of receiving a release or confirmation from the freeholder in fee. An exchange of lands (*r*) is now carried out by deed of grant (*s*), or else by order of the Board of Agriculture operating under the Inclosure Acts in the same manner as an order for partition (*t*). As we have seen, the surrender of any estate (not being copyhold or customary) must now be made by deed, except in the case of a surrender by operation of law (*u*).

Exchange.

Surrender.

Conveyance under powers.

In addition to all these methods of conveyance, by which the right of alienation *incident to an estate* in land may be exercised (*x*), an estate of freehold may be conveyed by the exercise of a power of appointment or of a statutory power. Mention has already been made of conveyance under powers (*y*), and more will be said on this subject in a future chapter (*z*). There are also various statutory methods of conveying lands registered under the Land Transfer Acts, 1875 and 1897; and these demand notice, now that registration has been made compulsory in the Metropolis (*a*); but they are reserved for subsequent consideration (*b*). The student, indeed, can never be too careful to avoid supposing that, when he has read a chapter of the present, or any other elementary work, he is therefore acquainted with all that is to be known on the subject. To place him in a position to comprehend more is all that can be attempted in a first book.

(*p*) *Ante*, pp. 156, 196.
(*q*) Litt. s. 531; Co. Litt. 301 b.
(*r*) *Ante*, p. 156.
(*s*) 1 Key & Elphinstone, Prec. Conv. 700 *sq.*, 4th ed.
(*t*) *Ante*, p. 141.
(*u*) *Ante*, p. 156 & n. (*s*).
(*x*) *Ante*, pp. 65—74, 145, 146.
(*y*) *Ante*, p. 117.
(*z*) *Post*, Part. II., ch. iii.
(*a*) *Ante*, p. 208.
(*b*) *Post*, Part VII.

CHAPTER IX.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

Having examined the means of conveying a freehold estate between living persons, we will now proceed to consider the subject of succession after death. This can, of course, only take place in the case of a freehold estate in fee or in tail. Succession to a freehold in fee may be upon intestacy or under a will: but the succession to an estate tail cannot be affected by the tenant's will, as we have seen (*a*). At the present day, it is perhaps exceptional for a man to become entitled to a freehold in fee, as *heir*, upon the death of a former tenant intestate (*b*). But as this is a more ancient method of acquiring title than to take lands by devise under the tenant's last will, we will investigate the law of succession upon intestacy before examining that of conveyance by will. In the first place, however, we must advert to the statute already noticed (*c*), whereby the title of an heir or a devisee, though not destroyed, is in effect postponed to the interest in a man's real estate thereby given to his executors or administrator on his death.

Land Transfer Act, 1897.

Devolution of real estate to the executors or administrator.

By the Land Transfer Act, 1897 (*d*), "where real estate is vested in any person without a right in any other person to take by survivorship (*e*), it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a

(*a*) *Ante*, p. 105.
(*b*) See *ante*, p. 85.
(*c*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202.
(*d*) Stat. 60 & 61 Vict. c. 65, s. 1 (1).
(*e*) See *ante*, p. 136.

chattel real vesting in them or him." This enactment applies only in cases of death after the year 1897 (*f*). The Act appears to apply to real estate so vesting in the personal representatives all the rules of law relating to chattels real vesting in them at common law; and it gives them the same powers, rights, duties, and liabilities in respect of the deceased person's real estate as they have by law with regard to his chattels real, save that it prohibits some or one only of several joint personal representatives from selling or transferring real estate without the authority of the Court (*g*). It makes real estate liable to be administered for payment of the deceased person's funeral and testamentary or administration expenses and debts (*h*) in the same manner as personal estate, but without altering the order in which realty and personalty were previously applicable for such purposes (*i*), or the liability of real estate to be charged with the payment of legacies (*j*). And it provides that, subject to these powers, rights, duties and liabilities, the personal representatives shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*k*). To enable the student to understand these enactments, some further account must be given of an executor's or administrator's position with regard to personalty.

Personal representatives.

A dead man's personal representatives are his executors or administrators (*l*), for they represent his *persona* in

(*f*) Sects. 1 (2). 25.

(*g*) Sect. 2 (2).

(*h*) See *ante*, pp. 29, 81, and *post*, ch. xi.

(*i*) See *post*, ch. xi.

(*j*) Stat. 60 & 61 Vict. c. 65, s. 2 (3). Pecuniary legacies are primarily payable out of personalty, and are not payable out of real estate, unless the testator has expressly or impliedly charged his real estate with the payment of his legacies; 1 Jarm. Wills, 1408—1416, 5th ed.: *Re Bawden*, 1894, 1 Ch. 693; *Re Boards*, 1895, 1 Ch. 499.

(*k*) Sect. 2 (1).

(*l*) Stat. 60 & 61 Vict. c. 65, s. 24 (2).

law for the purpose of suing or being sued on liabilities incurred to or by him in his lifetime (*m*). Executors, as we have seen (*n*), are the persons appointed by a testator to carry out his will: an administrator is the person appointed, formerly by the ordinary, afterwards by the Court of Probate, and now by the High Court of Justice, to administer the personal effects of a person who has died intestate (*o*). Executors and administrators are alike in this, that the whole of the dead man's personal estate, including his chattels real, vests absolutely in them at law, as to executors, immediately upon the testator's death, as to an administrator upon his appointment (*p*); and that their duty is to apply the property so vested in them in payment of the deceased person's funeral and testamentary or administration expenses and debts, and then to dispose of the surplus according to the directions of the will, if a will were left, or if not, according to the Statutes of Distribution (*q*).

Executor's or administrator's power of disposition.

For the purpose of raising money to pay debts, expenses and pecuniary legacies, an executor is empowered by law to sell or mortgage all or any part of the dead man's chattels; and an administrator has the same power for the like purposes. But no purchaser or mortgagee from an executor or administrator at any time after the death is bound to inquire whether any debts remain unpaid, or for what purpose the sale is made, or concerning the application of the money raised: for it is presumed, in the absence of evidence to the contrary, that the executor or administrator is acting in the proper discharge of his office, and his receipt alone is a good discharge (*r*).

(*m*) Wms. Exors. i. 785—789, ii. 1129, 1721 *sq.*, 7th ed.; i. 695—697, ii. 992, 1593 *sq.*, 9th ed.; 2 Jarm. Wills, 957, 5th ed.; Wms. Pers. Prop. 29, & n. (*u*), 15th ed.

(*n*) *Ante*, pp. 20, 21, & n. (*m*).

(*o*) Wms. Pers. Prop. 422, 452, 15th ed.

(*p*) *Ibid.* 422, 454.

(*q*) *Ante*, pp. 21, 29, n. (*n*); Wms. Pers. Prop. 432 *sq.*, 454 *sq.*, 15th ed.

(*r*) Wms. Exors. ii. 932, 7th ed.: i. 801, 9th ed.; Wms. Pers. Prop. 432, 454, 15th ed.: *Re Whistler*, 35 Ch. D. 561: *Re Venn & Furze's Contract*, 1891, 2 Ch. 101.

Probate of a will.

Every will of personalty is required to be proved in the High Court of Justice, which in 1875 succeeded to the jurisdiction in this respect exercised, formerly by the Ecclesiastical Courts, and after 1857 by the Court of Probate (*s*); and the copy of the will delivered to the executor by the Court (called the probate copy or the probate (*t*)) is the only legal evidence of his right to intermeddle with the estate. But an executor derives his title from the will, not from the probate thereof: the personal estate passes to him directly, immediately on the testator's death, and he can perform any ordinary act of administration, such as selling any part of the effects, before probate (*u*). An administrator's title is derived solely from the grant of administration made to him by the Court, before which he has no legal interest whatever in the intestate's property, and the proper evidence of his title is the letters of administration by which the grant is made (*x*). One appointed executor is not obliged to accept office: he may renounce probate, that is, signify to the Court his refusal to act, and thereupon his rights in respect of the executorship will wholly cease (*y*). Where a testator appoints more executors than one, each of them has an equal and entire interest in and power over the whole personal estate devolving upon them, and can therefore make a valid disposition of the same without the concurrence of the others (*z*). And one of several administrators appears to have the same power; though joint administrators are very rarely appointed (*a*). Where one of several

Letters of administration.

Renunciation of probate.

(*s*) *Ante*, pp. 21, n. (*m*), 164.

(*t*) The original will is deposited in Court.

(*u*) 1 Wms. Exors. 293, 302, 629, 7th ed.; 243, 249, 551, 9th ed.; Wms. Pers. Prop. 427, 15th ed.

(*x*) 1 Wms. Exors. 404, 630, 7th ed.; 342, 552, 9th ed.; Wms. Pers. Prop. 451—454, 15th ed.

(*y*) Wms. Pers. Prop. 430, 15th ed.

(*z*) *Simpson* v. *Gutteridge*, 1 Madd. 609; Wms. Exors. 911, 946, 947, 7th ed.; 785, 816, 817, 9th ed.; Wms. Pers. Prop. 425, 15th ed.

(*a*) 2 Wms. Exors. 950, 7th ed.; 820, 9th ed.; Wms. Pers. Prop. 453, 15th ed.

executors dies, the office survives to those who remain (*b*): but on the death of a sole or last surviving executor, having proved the will but not completely administered the estate and leaving an executor, that executor becomes *ipso facto* the executor of the original testator, and has the same interest in and powers over the original testator's chattels as his own testator had (*c*). But the office of administrator is not so transmissible. If an administrator die before his office is discharged, a new administrator (called an administrator *de bonis non administratis* or shortly *de bonis non*) must be appointed by the Court; and such an administrator must also be appointed if an executor die intestate leaving the estate unadministered. Also if a testator omit to appoint executors, or all his executors die before him or renounce probate, an administrator *cum testamento annexo* must be appointed to act (*d*). Where any chattel, personal or real, is specifically bequeathed by will to any person, it passes nevertheless to the executor on the testator's death and is alienable by him equally with the rest of the testator's personalty (*e*), and does not vest in the legatee until the executor has signified his assent to the bequest; and this assent must not be given until the executor is satisfied that he has sufficient to pay the debts and expenses without having recourse to the property so bequeathed (*f*). When this assent is given, the property bequeathed vests at once in the legatee at law without any further formality (*g*). Before such assent is given, the specific legatee, though he has no interest at all, not even a right to sue, at law, has a right to sue in equity for the due administration of the estate, so that the chattels specifically bequeathed shall be secured to

Executors' assent to specific bequest of a chattel.

(*b*) Wms. Pers. Prop. 425, 15th ed.

(*c*) 1 Wms. Exors. 254, 255, 276, 282, 915, 7th ed.: 204, 205, 227, 233, 788, 9th ed.: Wms. Pers. Prop. 424, 15th ed.

(*d*) 1 Wms. Exors. 470 *sq.*, 7th ed.: 408 *sq.*, 9th ed.: Wms. Pers. Prop. 456, 457, 15th ed.

(*e*) *Ante*, p. 215.

(*f*) Wms. Pers. Prop. 423, 15th ed.

(*g*) *Re Culverhouse*, 1896, 2 Ch. 251.

him; and he has a corresponding equitable interest (*h*) therein, of which he can dispose (subject of course to the liability to the testator's debts), and which will devolve upon his personal representatives in the event of his death after the testator but before the executor has signified his assent (*i*). And pecuniary or residuary legatees and the persons entitled to the effects of an intestate under the Statutes of Distribution (*k*) have similar equitable interests in their legacies or shares before the same are actually paid or distributed to them (*l*).

Effect of the Land Transfer Act. 1897.

Since the Land Transfer Act. 1897 (*m*), took effect then, a man's real estate, including his legal and equitable estates in fee simple (*n*) or *pur autre vie* (*o*), vests after his death in his executors or administrator in the same manner as a chattel real (*p*); and his personal representatives have the same power to dispose thereof as they have over chattels real vesting in them (*q*), save that some or one only of several joint personal representatives may not sell or transfer real estate without the authority of the Court. Where a testator appoints several executors, his real estate vests in all of them immediately on his death: but if there be three executors and one of them does not prove the will and does not renounce probate (*r*), the other two cannot dispose of the real estate without the concurrence of or a disclaimer (*s*) by the third (*t*): but renunciation of probate

(*h*) *Ante*, p. 178.

(*i*) Wentworth. Exors. 66—70; 2 Wms. Exors. 1372, 7th ed.; 1225, 9th ed.; Wms. Pers. Prop. 34. 434, 449, 450.

(*k*) *Ante*, pp. 21, 29, n. (*u*).

(*l*) Wms. Pers. Prop. 449, 450, 466, 15th ed.

(*m*) *Ante*, p. 213.

(*n*) *Ante*, pp. 85, 181. As to estates tail, see *ante*, p. 109.

(*o*) *Ante*, p. 129.

(*p*) *Ante*, pp. 20, 21, 215.

(*q*) *Ante*, p. 215.

(*r*) Some or one only of several executors may prove a will, in which case, if the other or others do not renounce probate, power is reserved for him or them to come in and prove the will. See 1 Wms. Exors. 381, 7th ed.; 320, 9th ed.

(*s*) *Ante*, p. 84.

(*t*) *Re Pawley & London & Provincial Bank*, 1900, 1 Ch. 58.

by one appointed executor is equivalent to a disclaimer of any interest conferred by the appointment in the testator's estate, real or personal (*u*). Subject to the interest and powers so given to the dead man's personal representatives and the liability of the real estate to be disposed of to satisfy his debts and testamentary or administration expenses, the title of his heir or devisee remains. But the nature of that title is changed. No longer does an estate in fee simple vest at law in the heir or devisee immediately on the tenant's death; at law the whole estate now goes to the executors or administrator. But as we have seen (*x*), subject to the liability for debts and expenses, the personal representatives are to hold the real estate as trustees for the persons beneficially entitled, who are to have the same power of requiring a transfer thereof as persons beneficially entitled to personal estate have of requiring a transfer of the same: so that the heir or devisee retains an equitable estate in the land exactly similar to the interest of the legatee of a specific chattel before the executor has assented to the bequest (*y*). This equitable estate vests immediately on the death of the ancestor or testator in the heir or devisee, and may be aliened by him *inter vivos* or by will, and will devolve on his death as part of his own estate, subject always to the ancestor's or testator's debts, &c. But the heir or devisee does not acquire any legal estate in the lands descended or devised until the personal representatives have conveyed the same to him by the usual means of conveyance (*z*), or in the case of lands devised have assented to the devise, when the lands will vest in the devisee at law without any further conveyance (*a*). Such conveyance or assent may be made, either subject to a charge on the lands for the payment of any money which the personal representatives are liable to pay, or without

(*u*) See *Long* v. *Symes*, 3 Hagg. 771, 774, 776; *Re Birchall*, 40 Ch. D. 436, 439; *Re Fisher & Haslett*, 13 L. R. Ir. 546.

(*x*) *Ante*, p. 214.

(*y*) *Ante*, p. 217.

(*z*) *Ante*, pp. 201, 210.

(*a*) *Ante*, pp. 214, 217.

any such charge; and if the same be made subject to such a charge, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into previously by them (*b*). If the personal representatives fail to convey the real estate to the heir or devisee within a year after the tenant's death (this being the period always allowed to executors or administrators for payment of the debts (*c*)), the Court may, on the application of the heir or devisee, order the conveyance to be made (*d*).

Estates tail.

As we have seen (*e*), the careless wording of this Act has left open the question, whether an estate tail now vests in the tenant's personal representatives on his death. An estate tail is certainly real estate: but it is clear that the term *real estate* as used in the Act must receive a restricted interpretation. Thus an estate for a man's life is his real estate: but his interest ceases on his death (*f*), and it can scarcely be argued that the Act operates to prolong that interest in the hands of his personal representatives. Perhaps the key to the construction of the enactment in question may be found in the words "notwithstanding any testamentary disposition" (*g*). It may not improbably be held that the Act is only intended to affect the devolution of devisable real estate, and does not therefore alter the descent of an estate tail. Besides this, it may be urged that the Act does not show a sufficiently clear intention with respect to estates tail to override the provisions of the statute *De Donis* (*h*), regulating the devolution of such estates according to the will of the donor, and to charge them with the payment of a deceased tenant's debts

(*b*) Stat. 60 & 61 Vict. c. 65, s. 3 (1).
(*c*) Wms. Pers. Prop. 436, 455, 15th ed.
(*d*) Stat. 60 & 61 Vict. c. 65, s. 3 (2).
(*e*) *Ante*, *p.* 108.
(*f*) *Ante*, p. 110.
(*g*) *Ante*, p. 213.
(*h*) Stat. 13 Edw. I. c. 1: *ante*, p. 93.

generally—a liability from which they were previously exempt (*i*).

Rules of descent.

With this preface we will now proceed to consider the rules of the descent of a fee, as altered by the Inheritance Act, 1833 (*k*). For, notwithstanding the Land Transfer Act, 1897, the title of an heir is still ascertained by the same rules as were in force before: although since that Act his interest, in the case of estates in fee simple, is at first equitable only, and he does not obtain the legal estate in the lands descended to him until the same has been expressly conveyed to him by the deceased tenant's personal representatives. The Inheritance Act, 1833 (*k*), does not extend to any descent on the death of any person who may have died before the year 1834 (*l*). For the rules of descent prior to that date, the reader is referred to the Commentaries of Blackstone (*m*), to Watkins's Essay on the Law of Descents, and to the author's Lectures on Seisin (*n*).

Rule 1.

1. The first rule of descent now is, that inheritances shall lineally descend, in the first place, to the issue of the last purchaser *in infinitum*. As we have seen (*o*), the word purchase has in law a meaning more extended than its ordinary sense: it is possession to which a man cometh not by title of descent (*p*): a devisee under a will is accordingly a purchaser in law. And, by the Act, the purchaser from whom descent is to be traced is defined to be the last person who had a right to the land, and who cannot be proved to have acquired the land by descent, or by certain means (*q*) which render the land part of, or descendible in the same manner as, other

Purchase.

(*i*) See *post*, ch. xi.
(*k*) Stat. 3 & 4 Will. IV. c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20.
(*l*) Sect. 11.
(*m*) 2 Black. Comm. c. 14.
(*n*) Pp. 51—69.
(*o*) *Ante*, p. 68.
(*p*) Litt. s. 12.
(*q*) Escheat, Partition and Inclosure, s. 1.

Descent formerly traced from the person last seised.

land acquired by descent. This rule is an alteration of the old law, which was, that descent should be traced from the person who last had the feudal possession or seisin (*r*); the maxim being *seisina facit stipitem* (*s*). This maxim, a relic of the troublesome times when right without possession was worth but little, sometimes gave occasion to difficulties, owing to the uncertainty of the question, whether possession had or had not been taken by any person entitled as heir; thus, where a man was entering into a house by the window, and when half out and half in, was pulled out again by the heels, it was made a question, whether or not this entry was sufficient, and it was adjudged that it was (*t*). These difficulties cannot arise under the present law; for now the heir to be sought for is not the heir of the person *last seised*, but the heir of the *last person entitled who did not inherit*, whether he did or did not obtain the possession, or the receipt of the rents and profits of the land. The rule, as altered, is not indeed altogether free from objection; for it will be observed that, not content with making a title to the land equivalent to possession, the Inheritance Act added a new term to the definition, by directing descent to be traced from the last person entitled *who did not inherit*. So that if a person who has become entitled as heir to another should die intestate, the heir to be sought for is not the heir of such last owner, but the heir of the person from whom such last owner inherited. This provision, though made by an Act consequent on the report of the Real Property Commissioners, was not proposed by them. The Commissioners merely proposed that lands should pass to the heir of the *person last entitled* (*u*), instead, as before, of the *person last seised*; thus facilitating the discovery of the heir, by rendering a mere title to the lands sufficient to make the person

Objection to the alteration.

(*r*) *Ante*, p. 36.

(*s*) 2 Black. Comm. 209; Watk. Descent, c. 1. s. 2.

(*t*) Watk. Descent, 45 (4th ed. 53).

(*u*) Thirteenth proposal as to Descents.

entitled the stock of descent, without his obtaining the feudal possession as before required. Under the old law, descent was confined within the limits of the family of the *purchaser;* but now no person who can be shown to have inherited can be the stock of descent, except in the case of the total failure of the heirs of the purchaser (*x*); in every other case, descent must be traced from the last *purchaser*. The author is bound to state that the decision of the Courts of Exchequer and the Exchequer Chamber, in the case of *Muggleton* v. *Barnett* (*y*), is opposed to this view of the construction of the statute. The reasons which induced the author to think that decision erroneous will be found in Appendix B.

2. The second rule is, that the male issue shall be admitted before the female (*z*). Rule 2.

3. The third rule is, that where two or more of the male issue are in equal degree of consanguinity to the purchaser the eldest only shall inherit; but the females shall inherit all together (*a*). The last two rules are the same now as before the Inheritance Act; accordingly, if a man has two sons, William and John, and two daughters, Susannah and Catherine (*b*), William, the eldest son, is the heir at law, in exclusion of his younger brother John, according to the third rule, and of his sisters, Susannah and Catherine, according to rule 2, although such sisters should be his seniors in years. If, however, William should die without issue, then John will succeed, by the second rule, in exclusion of his sisters: but if John also should die without issue, the two sisters will succeed in equal shares by the third rule as being together heir to their father. Rule 3.

Primogeniture, or the right of the eldest among the males to inherit, was a matter of far greater consequence Primogeniture.

(*x*) Stat. 22 & 23 Vict. c. 35. ss. 19, 20.
(*y*) 1 H. & N. 282, 2 H. & N. 653.
(*z*) 2 Black. Comm. 212.
(*a*) *Ibid.* 214.
(*b*) See the Table of Descents annexed.

in ancient times, before alienation by will was permitted, than it is at present. Its feudal origin is undisputed: but in this country it appears to have taken deeper root than elsewhere; for a total exclusion of the younger sons appears to be peculiar to England: in other countries, some portion of the inheritance, or some charge upon it, is, in many cases at least, secured by law to the younger sons (*c*). From this ancient right has arisen the modern English custom of settling the family estates on the eldest son; but the right and the custom are quite distinct: the right may be prevented by the owner making his will; and a conformity to the custom is entirely at his option.

Coparceners.

When two or more persons together form an heir, they are called in law, *coparceners*, or more shortly, *parceners* (*d*). The term is derived, according to Littleton (*e*), from the circumstance that the law will constrain them to make partition; that is, any one may oblige all the others so to do. Whatever may be thought of this derivation, it will serve to remind the reader that coparceners are the only kind of joint owners to whom the ancient common law granted the power of severing their estates without mutual consent; as the estate in coparcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property. This compulsory partition was formerly effected by a writ of partition (*f*), a proceeding now abolished (*g*). The modern method is by an action for partition in the Chancery Division of the High Court (*h*). Partition, however, is most frequently made by voluntary agreement between the parties, and for this purpose a

Partition.

(*c*) Co. Litt. 191 a, n. (1), vi. 4.
(*d*) Bac. Abr. tit. Coparceners.
(*e*) Sect. 241; 2 Black. Comm. 189.
(*f*) Litt. ss. 247, 248.
(*g*) Stat. 3 & 4 Will. IV. c. 27, s. 36.
(*h*) *Ante*, p. 140.

deed has, by the Real Property Act, 1845, been rendered essential in every case (*i*). The Board of Agriculture has also power to effect partitions under the Inclosure Acts (*k*). When partition has been effected, the lands allotted are said to be held in *severalty*; and each owner is said to have the *entirety* of her own parcel. After partition, the several parcels of land descend in the same manner as the undivided shares, for which they have been substituted (*l*); the coparceners, therefore, do not by partition become *purchasers*, but still continue to be entitled by descent. The term *coparceners* is not applied to any other joint owners, but only to those who have become entitled as coheirs (*m*).

Severalty.

Entirety.

4. The fourth rule is, that all the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living (*n*). Thus, in the case above mentioned, on the death of William the eldest son, leaving a son, that son would succeed to the whole by right of representation, in exclusion of his uncle John, and of his two aunts Susannah and Catherine; or had William left a son and daughter, such daughter would, after the decease of her brother without issue, be, in like manner, the heir of her grandfather, in exclusion of her uncle and aunts.

Rule 4.

The preceding rules of descent apply as well to the descent of an estate tail, if not duly barred, as to that of an estate in fee simple. The descent of an estate tail is always traced from the purchaser, or donee in tail, that is, from the person to whom the estate tail was at first given. This was the case before the Act,

Descent of an estate tail.

(*i*) Stat. 8 & 9 Vict. c. 106, s. 3, replacing 7 & 8 Vict. c. 76, s. 3: *ante*, p. 140.
(*k*) *Ante*, p. 141.
(*l*) 2 Prest. Abst. 72; *Doe* d. *Crosthwaite* v. *Dixon*, 5 A. & E. 834.
(*m*) Litt. s. 254.
(*n*) 2 Black. Comm. 216.

as well as now (*o*) ; for the person who claims an entailed estate as heir, claims only according to the express terms of the gift, or, as it is said, *per formam doni*. The gift is made to the donee, or purchaser, and the heirs of his body ; all persons, therefore, who can become entitled to the estate by descent, must answer the description of heirs of the purchaser's body ; in other words, must be *his* lineal heirs. The second and third rules also equally apply to estates tail, unless the restriction of the descent to heirs male or female should render unnecessary the second, and either clause of the third rule. The fourth rule completes the canon, so far as estates tail are concerned ; for when the issue of the donee are exhausted, such an estate must necessarily determine. But the descent of an estate in fee simple may extend to many other persons, and accordingly requires for its guidance additional rules, with which we now proceed.

Widow's interest on death of tenant in fee without issue.

The descent of a fee simple upon the tenant's death without leaving issue is now subject to the interest which his widow may take therein under the Intestates Estates Act, 1890 (*p*). By this Act (*q*), the real and personal estates of every man who shall die intestate after the 1st of September, 1890, leaving a widow, but no issue, shall, if not exceeding five hundred pounds in net value (*r*), belong to his widow absolutely ; and shall, if exceeding that sum in net value, be subject to a charge in her favour of five hundred pounds, with interest at four per cent. from the date of death till payment, to be borne by the real and personal estates in proportion to their value. The provision so made is to be in addition

(*o*) *Doe* d. *Gregory* v. *Whichelo*, 8 T. Rep. 211.

(*p*) Stat. 53 & 54 Vict. c. 29.

(*q*) Sects. 1—3. The Act does not apply to cases of partial intestacy ; *Re Twigg's Estate*, 1892, 1 Ch. 579.

(*r*) *I.e.*, after deducting the value of any charges on the real estate, and of all debts, funeral and administration expenses, and other liabilities, payable out of the personal estate ; see ss. 5, 6 ; *Re Twigg's Estate*, *ubi sup.*

to the widow's other interest in her intestate husband's real and personal estate (*s*). It appears that the whole estate of a tenant in fee simple will devolve on his widow, in the case contemplated by this Act, whether he became entitled by purchase or inheritance. But in other cases his estate will descend according to the following rules, subject, of course, to the charge given by the Act, where it arises.

5. The fifth rule is, that on failure of lineal descendants, or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor. This rule is materially different from the rule which prevailed before the passing of the Inheritance Act. The former rule was that, on failure of lineal descendants or issue of the person last seised, the inheritance should descend to his *collateral* relations, being of the blood of the first purchaser, subject to the three preceding rules (*t*). The old law never allowed lineal relations in the ascending line (that is, parents or ancestors) to succeed as heirs (*u*). But, by the Inheritance Act, descent is to be traced through the ancestor, who is to be heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; and the father is heir to each of his children who may die intestate and without issue, as is more clearly pointed out by the next rule. Rule 5. The old rule.

6. The sixth rule is, that the father and all the male paternal ancestors of the purchaser, and their descendants, shall be admitted before any of the female paternal Rule 6.

(*s*) Sect. 4. See *post*, ch. xiii.; *Re Charriere*, 1896, 1 Ch. 912.

(*t*) 2 Black. Comm. 220.

(*u*) It is very difficult to account for this rule; see Co. Litt. 11 a & n. (1); 2 Black. Comm. 211, 212, 220—223. It is now suggested that it may be the outcome of a doctrine in force before subinfeudation was prohibited, that the same person cannot be both lord and heir of the same tenement. This doctrine prevented a father from

ancestors or their heirs; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors, or her or their descendants; and the mother and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors, or their heirs (*x*). This rule is a development of the ancient canon, which required that, in collateral inheritances, the male stocks should always be preferred to the female (*y*); and it is analogous to the second rule above given, which directs that in lineal inheritances the male issue shall be admitted before the female.

Preference of males to females.

Preference of males to females still continued.

The preference of males to females was left untouched by the Inheritance Act; and the father and all his most distant relatives have priority over the mother of the purchaser; she cannot succeed as his heir until all the paternal ancestors of the purchaser, both male and female, and their respective families, have been exhausted. The father, as the nearest male lineal ancestor, of course stands first, supposing the issue of the purchaser to have failed. If the father should be dead, his eldest son, being the brother of the purchaser, will succeed as heir in the place of his father, according to the fourth rule; unless he be of the half blood to the purchaser, which case is provided for by the next rule, which is:—

Rule 7.

7. That a kinsman of the half blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor is a male (*z*), and next after the common ancestor, when such ancestor is a female. This introduction of the half blood is also a new regulation; and,

succeeding as heir to a tenement of which he had enfeoffed one of his sons in fee, so as to create a tenure between them: see Glanv. vii. 1; P. & M. Hist. Eng. Law, ii. 284 *sq.*

(*x*) Stat. 3 & 4 Will. IV. c. 106, s. 7, combined with the definition of "descendants," s. 1.

(*y*) Plowd. 444; 2 Black. Comm. 234. As to the English scheme of collateral inheritance, see P. & M. Hist. Eng. Law, ii. 293—300.

(*z*) Stat. 3 & 4 Will. IV. c. 106, s. 9.

like the introduction of the father and other lineal ancestors, it is certainly an improvement. By the old law, a relative of the purchaser of the half blood, that is, a relative connected by one only, and not by both of the parents, or other ancestors, could not possibly be heir; a half-brother, for instance, could never enjoy that right which a cousin of the whole blood, though ever so distant, might claim in his proper turn (*a*). The present position of the half blood next after the common ancestor, when such ancestor is a female, is rather a result of the sixth rule, than an additional independent regulation, as will appear hereafter.

By the old law the half blood could not inherit.

8. The eighth rule is, that in the admission of female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor, and her heirs; and, in the admission of female maternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs (*b*). The eighth rule is a settlement of a point in distant heirships, which very seldom occurs, but which has been the subject of a vast deal of learned controversy. The opinion of Blackstone (*c*) and Watkins (*d*) is now declared to be the law.

Rule 8.

9. A further rule of descent was introduced by a statute of 1859 (*e*), which enacts that, where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall

Rule 9.

(*a*) 2 Black. Comm. 228. As to the history of the exclusion of the half-blood, see P. & M. Hist. Eng. Law, ii. 300 *sq.*

(*b*) Stat. 3 & 4 Will. IV. c. 106, s. 8. See *Greares* v. *Greenwood*, 2 Ex. D. 289.

(*c*) 2 Black. Comm. 238.

(*d*) Watkins on Descents, 130 (146 *sq.*, 4th ed.).

(*e*) Stat. 22 & 23 Vict. c. 35, ss. 19, 20.

descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof. This enactment provides for such a case as the following. A purchaser of lands may die intestate, leaving an only son and no other relations. On the death of the son intestate there will be a total failure of the heirs of the purchaser; and previously to this enactment the land would have escheated to the lord of the fee (*f*). But now, although there be no relations of the son on his father's side, yet he may have relations on the part of his mother, or his mother may herself be living: and these persons, who were before totally excluded, are now admitted in the order mentioned in the sixth rule.

Explanation of the table.

The rules of descent above given will be better apprehended by a reference to the accompanying table, taken, with a little modification, from Mr. Watkins's Essay on the Law of Descents. In this table, Benjamin Brown is the purchaser, from whom the descent is to be traced.

Descent to the sons and their issue.

On his death intestate, the lands will accordingly descend first to his eldest son, by Ann Lee, William Brown; and from him (2ndly) to *his* eldest son by Sarah Watts, Isaac Brown. Isaac dying without issue we must now seek the heir of the *purchaser*, and not the heir of Isaac. William, the eldest son of the purchaser, is dead; but William may have had other descendants, besides Isaac his eldest son: and, by the fourth rule, all the lineal descendants *in infinitum* of every person deceased shall represent their ancestor. We find accordingly that William had a daughter Lucy by his first wife, and also a second son, George, by Mary Wood, his second wife. But the son George, though younger than his half sister Lucy, yet being a male, shall be preferred according to the second rule; and he is therefore (3rdly) the next heir. Had Isaac been the purchaser, the case would

(*f*) *Ante*, pp. 48, 55.

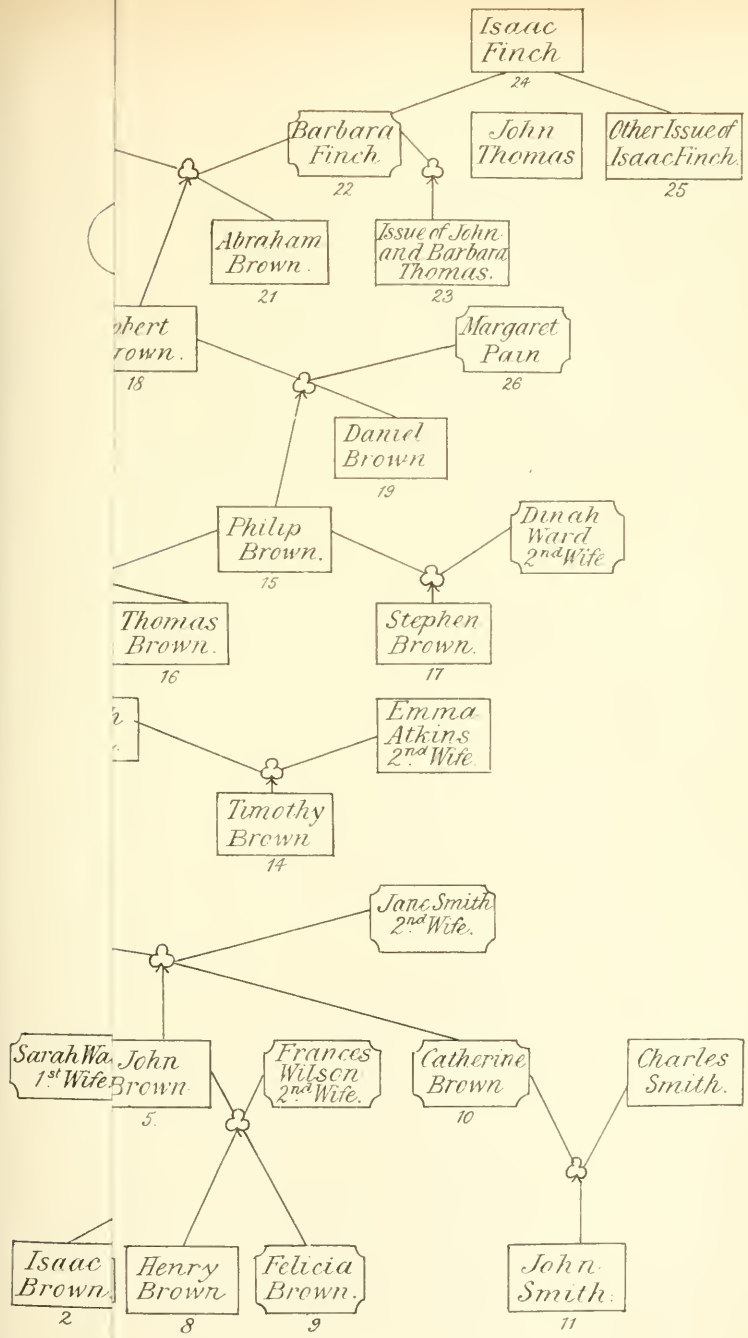
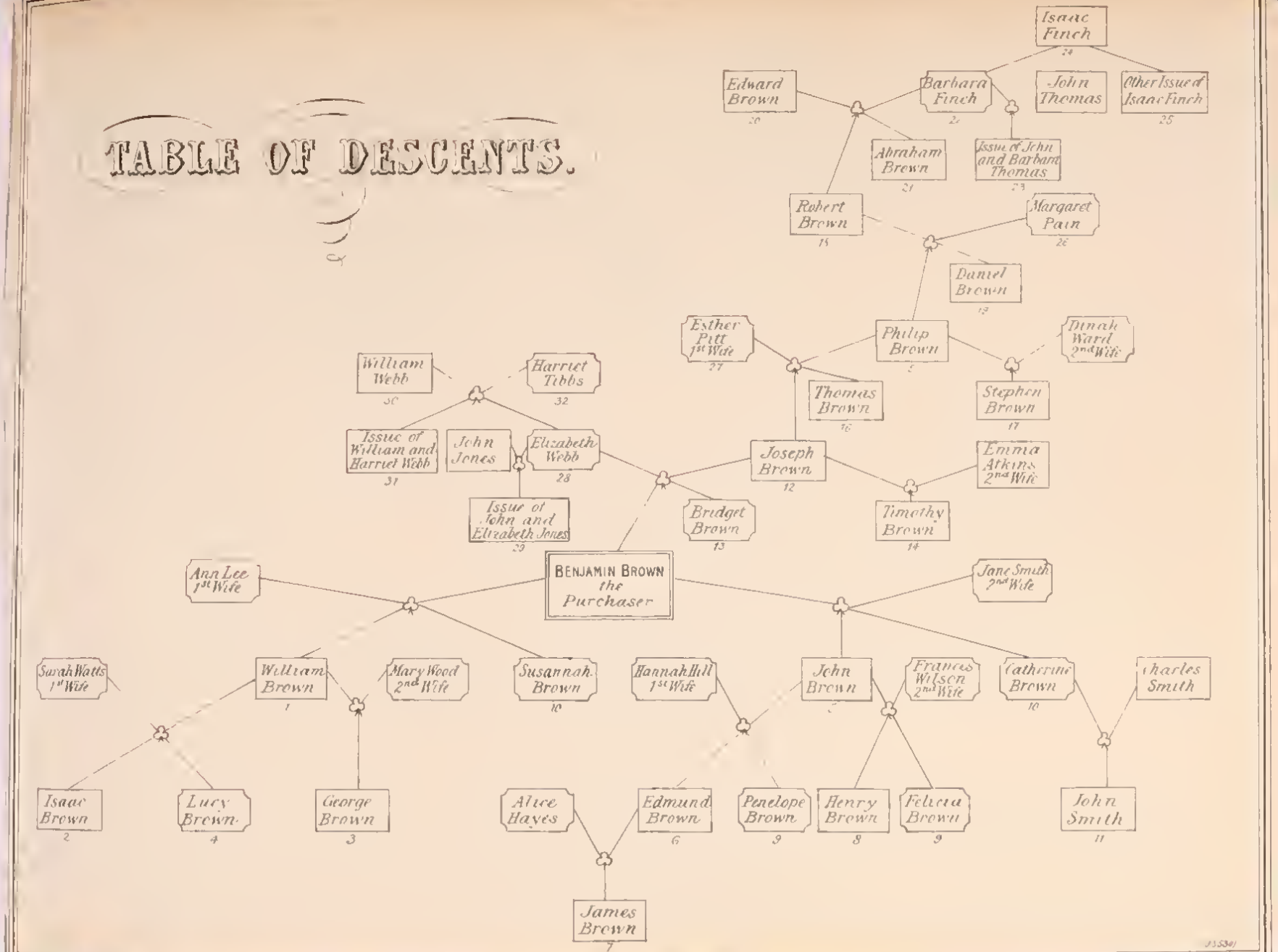

Isaac Finch
24
Barbara Finch
22
John Thomas
Other Issue of Isaac Finch
25
Abraham Brown
21
Issue of John and Barbara Thomas.
23
ohert rown.
18
Margaret Pain
26
Daniel Brown
19
Philip Brown.
15
Dinah Ward 2nd Wife
Thomas Brown.
16
Stephen Brown.
17
Emma Atkins 2nd Wife
Timothy Brown
14
Jane Smith 2nd Wife.
Sarah Wa. 1st Wife
John Brown
5.
Frances Wilson 2nd Wife.
Catherine Brown
10
Charles Smith.
Isaac Brown.
2
Henry Brown
8
Felicia Brown.
9
John Smith.
11

TABLE OF DESCENTS.



have been different; for, his half brother George would then have been postponed, in favour of his sister Lucy of the whole blood, according to the seventh rule. But now Benjamin is the purchaser, and both Isaac and George are equally his grandchildren. George dying without issue, we must again seek the heir of his grandfather Benjamin, who now is undeniably (4thly) Lucy, she being the remaining descendant of his eldest son. Lucy dying likewise without issue, her father's issue become extinct; and we must still inquire for the heir of Benjamin Brown the purchaser, whom we now find to be (5thly) John Brown, his only son by his second wife. The land then descends from John to (6thly) *his* eldest son Edmund, and from Edmund (7thly) to his only son James James dying without issue, we must once more seek the heir of the purchaser, whom we find among the yet living issue of John. John leaving a daughter by his first wife, and a son and a daughter by his second wife, the lands descend (8thly) to Henry his son by Frances Wilson, as being of the male sex: but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters, but by different wives; these daughters, being in the same degree and both equally the children of their common father whom they represent, shall succeed (9thly) in equal shares. One of these daughters dying without issue in the lifetime of the other, the other shall then succeed to the whole as the only issue of her father. But the surviving sister dying also without issue, we still pursue our old inquiry and seek again for the heir of Benjamin Brown, the purchaser.

Descent to the daughters of the purchaser and their issue.

The issue of the sons of the purchaser is now extinct; and, as he left two daughters, Susannah and Catherine, by different wives, we shall find, by the second and third rules, that they next inherit (10thly) in equal shares as heirs to him. Catherine Brown, one of the daughters, now marries Charles Smith, and dies, in the

lifetime of her sister Susannah, leaving one son John. The half share of Catherine must then descend to the next heir of her father Benjamin, the purchaser. The next heirs of Benjamin Brown, after the decease of Catherine, are evidently Susannah Brown and John Smith, the son of Catherine. And in the first edition of the present work it was stated that the half share of Catherine would, on her decease, descend to them. This opinion was very generally entertained (*g*). On further research, however, the author inclined to the opinion that the share of Catherine would, on her decease, descend entirely to her son (11thly) by right of representation: and that, as respects his mother's share, he and he only is the right heir of the purchaser (*h*). This view was confirmed by judicial decision (*i*); and it is now established that all the descendants of a deceased coparcener shall in turn inherit her share by right of representation before the other coparcener or coparceners can be admitted to succeed thereto (*k*).

Descent to the father of the purchaser, and his issue.

If Susannah Brown and John Smith should die without issue, the descendants of the purchaser will then have become extinct; and Joseph Brown, the father of the purchaser, will then (12thly), if living, be his heir by the fifth and sixth rules. Bridget, the sister of the purchaser, then succeeds (13thly), as representing her father, in preference to her half brother Timothy, who is only of the half blood to the purchaser, and is accordingly postponed to his sister by the seventh rule. But next to Bridget is Timothy (14thly) by the same rule, Bridget being supposed to leave no issue.

(*g*) 23 Law Mag. 279; 1 Hayes's Conv. 313; 1 Jarman & Blythewood's Conveyancing, by Sweet. 139.

(*h*) The reasoning which led the author to this conclusion was given in an Appendix to the 2nd and subsequent editions of this book, but is now omitted, as the point is settled past all controversy.

(*i*) *Cooper* v. *France*, 14 Jur. 214; 19 L. J. (N. S.) Ch. 313; *Lewin* v. *Lewin*, C. P., 21 Nov. 1874, stated in Williams on Seisin, 81.

(*k*) *Re Matson*, 1897, 2 Ch. 509.

Descent to the male paternal ancestors of the purchaser and their issue.

On the decease of Timothy without issue, all the descendants of the father will have failed, and the inheritance will next pass to Philip Brown (15thly), the paternal grandfather of the purchaser. But the grandfather being dead, we must next exhaust his issue, who stand in his place, and we find that he had another son, Thomas (16thly), who accordingly is the next heir; and, on his decease without issue, Stephen Brown (17thly), though of the half blood to the purchaser, will inherit, by the seventh rule, next after Thomas, a kinsman in the same degree of the whole blood. Stephen Brown dying without issue, the descendants of the grandfather are exhausted; and we must accordingly still keep, according to the sixth rule, in the male paternal line, and seek the paternal great grandfather of the purchaser, who is (18thly) Robert Brown; and who is represented, on his decease, by (19thly) Daniel Brown, his son. After Daniel and his issue follow, by the same rule, Edward (20thly) and his issue (21stly), Abraham.

Descent to the female paternal ancestors and their heirs.

All the male paternal ancestors of the purchaser, and their descendants, are now supposed to have failed; and by the sixth rule, the female paternal ancestors and their heirs are next admitted. By the eighth rule, in the admission of the female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor and her heirs. Barbara Finch (22ndly) and her heirs have therefore priority both over Margaret Pain and her heirs and Esther Pitt and her heirs; Barbara Finch being the mother of a more remote male paternal ancestor than either Margaret Pain or Esther Pitt. Barbara Finch being dead, her heirs succeed her; *she* therefore must now be regarded as the stock of descent, and her heirs will be the right heirs of Benjamin Brown the purchaser. In seeking for her heirs inquiry must first be made for her issue;

now her issue by Edward Brown has already been exhausted in seeking for his descendants; but she might have had issue by another husband; and such issue (23rdly) will accordingly next succeed. These issue are evidently of the half blood to the purchaser. But they are the right heirs of Barbara Finch; and they are accordingly entitled to succeed next after her, without the aid they might derive from the position expressly assigned to them by the seventh rule. The common ancestor of the purchaser and of the issue is Barbara Finch, a female; and, by the united operation of the other rules, these issue of the half blood succeed next after the common ancestor. The latter part of the seventh rule is, therefore, explanatory only, and not absolutely necessary (*l*). In default of issue of Barbara Finch, the lands will descend to her father Isaac Finch (24thly), and then to his issue (25thly), as representing him. If neither Barbara Finch, nor any of her heirs, can be found, Margaret Pain (26thly), or her heirs, will be next entitled, Margaret Pain being the mother of a more remote male paternal ancestor than Esther Pitt; but next to Margaret Pain and her heirs will be Esther Pitt (27thly), or her heirs, thus closing the lists of female paternal ancestors.

Half blood to the purchaser where the common ancestor is a female.

Next to the female paternal ancestors and their heirs comes the mother of the purchaser, Elizabeth Webb (28thly) (supposing her to be alive), with respect to whom the same process is to be pursued as has before been gone over with respect to Joseph Brown, the purchaser's father. On her death, her issue by John Jones (29thly) will accordingly next succeed, as representing her, by the fourth rule, agreeably to the declaration as to the place of the half blood contained in the seventh rule. Such issue becoming extinct, the nearest

Descent to the mother of the purchaser and the maternal ancestors.

(*l*) See Jarman & Blythewood's Conveyancing, by Sweet, vol. i. 146, note (*a*).

male maternal ancestor is the purchaser's maternal grandfather, William Webb (30thly), whose issue (31stly) will be entitled to succeed him. Such issue failing, the whole line of male maternal ancestors and their descendants must be exhausted, by the sixth rule, before any of the female maternal ancestors, or their heirs, can find admission: and when the female maternal ancestors are resorted to, the mother of the more remote male maternal ancestor, and her heirs, is to be preferred, by the eighth rule, to the mother of the less remote male maternal ancestor, and her heirs. The course to be taken is, accordingly, precisely the same as in pursuing the descent through the paternal ancestors of the purchaser. In the present table, therefore, Harriet Tibbs (32ndly), the maternal grandmother of the purchaser, is the person next entitled, no claimants appearing whose title is preferable; and, should she be dead, her heirs will be entitled next after her. On the failure of the heirs of the purchaser, the person last entitled is, as we have seen (*m*), to be substituted in his place, and the same course of investigation is again to be pursued with respect to the person last entitled as has already been pointed out with respect to the last purchaser. And if there should be no heirs of the person last entitled, as well as of the purchaser, the land will escheat to the lord of the fee, as has been previously explained (*n*).

Escheat.

Rules of descent do not apply to personal estate.

It should be carefully borne in mind, that the above-mentioned rules of descent apply exclusively to estates in land, and to that kind of property which is denominated *real*, and have no application to money or other personal estate, which is distributed on intestacy in a manner which the reader will find explained in the author's treatise on the law of personal property (*o*).

(*m*) *Ante*, p. 229.
(*n*) *Ante*, p. 55.
(*o*) Page 458, 15th ed.

Descent of real estate vested in sole trustee or mortgagee.

An exception to the law of descent was made in case of the death, after the year 1881 (*p*), of a sole trustee or mortgagee of freeholds. For by the Conveyancing Act of 1881 (*q*), where a freehold estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to his personal representatives, in like manner as if the same were a chattel real vesting in them. This enactment still regulates the devolution of freehold estates in fee simple vested in any one solely upon trust or by way of mortgage, the Land Transfer Act, 1897 (*r*), applying only to the real estate to which a deceased person was entitled for his own use, and not as trustee or mortgagee.

Succession and Estate Duty.

Heirs are now charged with succession and estate duty, as will be explained in the next chapter.

(*p*) By stats. 37 & 38 Vict. c. 78, s. 5, and 38 & 39 Vict. c. 87, s. 48, if any person seised of any hereditament in fee simple as a bare trustee died intestate between the 7th August, 1874, and the 31st December, 1881, the same vested like a chattel real in his legal personal representative. With this exception, before the year 1882, the fact, that a fee was held subject to a trust or mortgage, made no difference in the course of its descent at law. See *ante*, p. 188; Wms. Conv. Stat. 17, 19, 171.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 30, amended by 57 & 58 Vict. c. 46, s. 88, replacing 50 & 51 Vict. c. 73, s. 45; see Wms. Conv. Stat. 170 — 176; *Re Pilling's Trusts*, 26 Ch. D. 432.

(*r*) *Ante*, p. 213.

CHAPTER X.

OF A WILL OF LANDS.

The right of testamentary alienation of lands is a matter depending upon Act of Parliament. We have seen, that previously to the reign of Henry VIII. an estate in fee simple, if not disposed of in the lifetime of the owner, descended, on his death, to his heir at law (*a*). To this rule, gavelkind lands, and lands in a few favoured boroughs, formed exceptions; and the hardship of the rule was latterly somewhat mitigated by the prevalence of conveyances to *uses*; for the Court of Chancery allowed the *use* to be devised by will (*b*). But when the Statute of Uses (*c*) came into operation, and all uses were turned into legal estates, the title of the heir again prevailed, and the inconvenience of the want of testamentary power then began to be felt. To remedy this inconvenience, an Act of Parliament (*d*), to which we have before referred (*e*), was passed six years after the enactment of the Statute of Uses. By this Act, every person having any lands or hereditaments holden in socage, or in the nature of socage tenure, was enabled by his last will and testament in writing, to give and devise the same at his will and pleasure; and those who had estates in fee simple in lands held by knights' service were enabled in the same way to give and devise two-third parts thereof. When, by the statute of 12 Car. II. c. 24 (*f*), socage was made the universal

Statute of Wills.

(*a*) *Ante*, p. 75.
(*b*) *Ante*, p. 169.
(*c*) Stat. 27 Hen. VIII. c. 10; *ante*, p. 171.
(*d*) 32 Hen. VIII. c. 1, explained by statute 34 & 35 Hen. VIII. c. 5.
(*e*) *Ante*, p. 74.
(*f*) *Ante*, p. 54.

tenure, all estate in fee simple became at once devisable, being then holden by socage. This extensive power of devising lands by a mere writing unattested was soon curtailed by the Statute of Frauds (*g*), which required that all devises and bequests of any lands or tenements, devisable either by statute or the custom of Kent, or any borough, or any other custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and should be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they should be utterly void and of none effect. And thus the law continued till the year 1837, when the Wills Act was passed (*h*). By this Act the original statute of Henry VIII. (*i*) was repealed, except as to wills made prior to the 1st of January, 1838, and the law was altered to its present state. This Act permits of the devise by will of every kind of estate and interest in real property which would otherwise devolve to the heir of the testator, or, if he became entitled by descent, to the heir of his ancestor (*k*); but enacts (*l*), that no will shall be valid, unless it shall be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses, present at the same time (*m*); and such witnesses shall attest, and shall subscribe the will in the presence of the testator. One would have thought that this enactment was sufficiently clear, especially that part of it which directs the will to be signed at the

The Statute of Frauds.

Wills Act.

(*g*) 29 Car. II. c. 3. s. 5.

(*h*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*i*) 32 Hen. VIII. c. 1.

(*k*) Stat. 7 Will. IV. & 1 Vict. c. 26. s. 3. See *ante*, p. 56. n. (*i*), as to the devise of land, which would otherwise escheat to the lord of the fee.

(*l*) Sect. 9.

(*m*) See *Re Gunston*, 7 P. D. 102; *Wright* v. *Sanderson*, 9 P. D. 149; *Daintree* v. *Butcher and Fusulo*, 13 P. D. 67, 102; *Wyatt* v. *Berry*, 1893, P. 5.

foot or end thereof. Some very careless testators, and very clever judges, however, contrived to throw upon this clause of the Act a discredit which it did not deserve. And it was accordingly supplemented by an Act of 1852 (*u*), declaring that several positions of the testator's signature, which are enumerated with great elaboration (and all of which, the unlearned reader will probably think, might well have been considered as the foot or end of the will within the meaning of the Wills Act), shall not make the will void; and further providing that no signature shall give effect to any disposition which is underneath or follows it, or was inserted after it was made.

Who may be witnesses.

The Statute of Frauds, it will be observed, required that the witnesses should be credible; and, on the point of credibility, the rules of law with respect to witnesses were formerly very strict; for the law had so great a dread of the evil influence of the love of money, that it would not even listen to any witness who had the smallest pecuniary interest in the result of his own testimony. Hence, under the Statute of Frauds, a bequest to a witness to a will, or to the wife or husband of a witness, prevented such witness from being heard in support of the will; and, the witness being thus incredible, the will was void for want of three credible witnesses. By an Act of Geo. II. (*o*), a witness to whom a gift was made was rendered credible, and the gift only which was made to the witness was declared void; but the Act did not extend to the case of a gift to the husband or wife of a witness; such a gift, therefore, still rendered the whole will void (*p*). Under the Wills Act, however, the incompetency of the witness at the time of the execution of

Wills Act.

(*u*) Stat. 15 & 16 Vict. c. 24; see *Margary* v. *Robinson*, 12 P. D. 8; *Re Auster*, 1893. P. 283; *Royle* v. *Harris*, 1895, P. 163.

(*o*) Stat. 25 Geo. II. c. 6.

(*p*) *Hatfield* v. *Thorpe*, 5 B. & A. 589; 1 Jarm. Wills, 71, 72, 4th ed.; 2 Str. 1255.

the will, or at any time afterwards, is not sufficient to make the will invalid (*q*); and if any person shall attest the execution of a will, to whom, or to whose wife or husband, any beneficial interest whatsoever shall be given (except a mere charge for payment of debts), the person attesting will be a good witness; but the gift of such beneficial interest to such person, or to the wife or husband of such person, will be void (*r*). Creditors, also, are good witnesses, although the will should contain a charge for payment of debts (*s*); and the mere circumstance of being appointed executor is no objection to a witness (*t*). By subsequent statutes (*u*), the rule which excluded the evidence of witnesses in Courts of Justice, and of parties to actions and suits, on account of interest, was very properly abolished; and the evidence of interested persons is now received, and its value estimated according to its worth: but the Wills Act is not affected by these statutes (*x*).

Probate of wills of personalty.

As we have seen (*y*), wills of personal estate have always been required to be proved, formerly in the Ecclesiastical Courts, afterwards in the Court of Probate, and now in the High Court of Justice. But no

Wills of real estate.

such formality was required to establish a will of real estate, and the Courts of Common Law alone had jurisdiction on all questions arising on the validity of a will of real estate (*z*), the Ecclesiastical Courts and the Court of Probate having no jurisdiction to grant probate of a will relating to real estate only (*a*). Wills disposing of personal as well as real estate were obliged to be proved as

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 14.

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 15. See *Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 K. & J. 635; *Thorpe* v. *Bestwick*, 6 Q. B. D. 311; *Re Trotter*, 1899, 1 Ch. 764.

(*s*) Sect. 16.

(*t*) Sect. 17.

(*u*) Stats. 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, amended by 16 & 17 Vict. c. 83.

(*x*) Stats. 6 & 7 Vict. c. 85, s. 1; 14 & 15 Vict. c. 99, s. 5.

(*y*) *Ante*, p. 216.

(*z*) Bract. fo. 401 a; *Denn's case*, Cro. Car. 115; *Netter* v. *Brett*, *ibid.* 391, 395; Bac. Abr. Prohibition (L 2).

(*a*) 1 Wms. Exors. 389, 7th ed.; 326, 9th ed.; *Re Drummond*, 2

being wills of personalty (*b*); but in such cases the original will remained the only evidence available at common law of the testator's devise, the Courts of Common Law not regarding the probate copy (*c*) of the will in respect of the devised realty (*d*), although the probate was conclusive evidence of the will as to the testator's personalty (*e*). But now by the Court of Probate Act, 1857 (*f*), the probate of a will is admissible as evidence of a devise of real estate under the conditions specified in the Act. And by the same Act, a testator's heir at law and the devisees of his real estate might be cited to attend proceedings in the Court of Probate relating to the validity of a will, and would be bound by such proceedings if so cited or otherwise made parties thereto (*g*). Since 1875 these provisions have applied to proceedings in the High Court of Justice under the jurisdiction then transferred thereto from the Court of Probate (*h*); so that an heir at law, who, being also one of a testator's next of kin, has unsuccessfully contested the validity of his will as a disposition of personalty in proceedings to obtain probate thereof, cannot afterwards dispute the will as devising realty in an action brought under the High Court's common law jurisdiction (*i*). The Land Transfer Act, 1897 (*k*), now provides that probate or letters of administration may be granted in respect of real

Sw. & Tr. 8; *Re Barden*, L. R. 1 P. & M. 325; *Re Bootle*, L. R. 2 P. & M. 177; *Re Tomlinson*, 6 P. D. 209; *Re Hornbuckle*, 15 P. D. 149.

(*b*) See *Partridge's case*, 2 Salk. 552; *Anon.*, 3 Salk. 22; 1 Wms. Exors. 389, 7th ed.

(*c*) *Ante*, p. 216.

(*d*) *Doe* d. *Ash* v. *Calvert*, 2 Camp. 389; Taylor on Evidence, § 1565 A.

(*e*) *Allen* v. *Dundas*, 3 T. R. 125.

(*f*) Stat. 20 & 21 Vict. c. 77, ss. 62, 64, 65; see Taylor on Evidence, §§ 1565 A, B, C; *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

(*g*) Stat. 20 & 21 Vict. c. 77, ss. 61—63. See *Sugden* v. *St. Leonards*, 1 P. D. 154, 236. These provisions apply only to wills executed since and in accordance with the Wills Act; *Campbell* v. *Lucy*, L. R. 2 P. & M. 209.

(*h*) Stats. 36 & 37 Vict. c. 66, ss. 3, 4, 16; 37 & 38 Vict. c. 83; *ante*, p. 164; Wms. Pers. Prop. 141, 192, 427, 15th ed.

(*i*) *Beardsley* v. *Beardsley*, 1899, 1 Q. B. 746.

(*k*) Stat. 60 & 61 Vict. c. 65, s. 1 (3); see also s. 2 (4).

estate only, although there is no personal estate. This confers jurisdiction to grant probate of wills of realty only; but where such wills contain no appointment of executors or other disposition of the testator's personalty, it does not appear necessary to prove them (*l*).

Revocation of a will.

So much, then, for the power to make a will of lands, and for the formalities with which it must be accompanied. A will, it is well known, does not take effect until the decease of the testator. In the meantime, it

By marriage.

may be revoked in various ways; as by the marriage of either a man or a woman (*m*); though, before the Wills Act, the marriage of a man was not sufficient to revoke his will, unless he also had a child born (*n*). A will

By burning, &c.

may also be revoked by burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same (*o*). But the Wills Act enacts (*p*) that no obliteration, interlineation, or other alteration, made in any will after its execution, shall have any effect (except so far as the words or effect of the will, before such alteration, shall not be apparent (*q*)), unless such alteration shall be executed in the same manner as a will; but the signature of the testator, and the subscription of the witnesses, may be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a

(*l*) See *ante*, p. 240, n. (*a*).

(*m*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. "Except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions." *Re Fenwick*, L. R. 1 P. & D. 319; *Re Russell*, 15 P. D. 111.

(*n*) 1 Jarm. Wills, 122, 4th ed. See *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14.

(*o*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20. There must be both actual destruction and intent to destroy: *Andrew* v. *Motley*, 12 C. B. N. S. 514; *Cheese* v. *Lorejoy*, 2 P. D. 251; *Mills* v. *Millward*, 15 P. D. 20; and see *Atkinson* v. *Morris*, 1897, P. 40.

(*p*) Sect. 21.

(*q*) See *Finch* v. *Combe*, 1894, P. 191; *Re Brasier*, 1899, P. 36.

memorandum referring to such alteration, and written at the end or some other part of the will. A will may also be revoked by any writing, executed in the same manner as a will, and declaring an intention to revoke, or by a subsequent will or codicil (*r*), to be executed as before. And where a codicil is added, it is considered as part of the will; and the disposition made by the will is not disturbed further than is absolutely necessary to give effect to the codicil (*s*).

By writing duly executed.

By subsequent will.

By codicil.

The above are the only means by which a will can now be revoked; unless, of course, the testator choose afterwards to part with any of the property comprised in his will, which he is at perfect liberty to do. In this case the will is revoked, as to the property parted with, if it does not find its way back to the testator, so as to be his at the time of his death. Under the Statute of Hen. VIII. a will of lands was regarded in the light of a *present conveyance*, to come into operation at a future time, namely, on the death of the testator (*t*). And if a man, having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession, again become subject to his will, without a subsequent republication or revival of the will (*u*). But, under the Wills Act, no subsequent conveyance shall prevent the operation of the will, with respect to such devisable estate or interest as the testator shall have at the time of his death (*x*). In the same manner, the old statute was not considered as enabling a person to dispose by will of any lands, except such as he was possessed of at the time of making his will: so that

Subsequent disposition.

After-purchased lands.

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20. See *Hellier* v. *Hellier*, 9 P. D. 237; *Re Gosling*, 11 P. D. 79; *Re Hodgkinson*, 1893, P. 339; *Atkinson* v. *Morris*, 1897, P. 40; *Cadell* v. *Wilcocks*, 1898, P. 21.

(*s*) 1 Jarm. Wills, 176, 4th ed.; 139, 5th ed.

(*t*) See P. & M. Hist. Eng. Law, ii. 313.

(*u*) 1 Jarm. Wills, 147, 198, 4th ed.

(*x*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 23.

lands purchased after the date of the will could not be affected by any of its dispositions, but descended to the heir at law (*y*). This also is altered by the Wills Act, which enacts (*z*) that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. So that every man may now dispose, by his will, of all such landed property, or real estate, as he may hereafter possess, as well as that which he now has. Again, the result of the old rule, that a will of lands was a present conveyance, was, that a general devise by a testator of the residue of his lands was, in effect, a specific disposition of such lands and such only as the testator then had, and had not left to any one else (*a*). A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. The consequence of this was, that if any other persons to whom lands were left died in the lifetime of the testator, the residuary devisee had no claim to such lands, the gift of which thus failed; but the lands descended to the heir at law. This rule is altered by the Act, under which (*b*), unless a contrary intention appear by the will, all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

A will now speaks from the death of the testator.

General residuary devisee.

A lapse.

This failure of a devise, by the decease of the devisee in the testator's lifetime, is called a *lapse;* and this lapse is not prevented by the lands being given to the

(*y*) 1 Jarm. Wills. 645. 4th ed.
(*z*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 24; *Re Portal and Lamb*, 30 Ch. D. 50.
(*a*) 1 Jarm. Wills, 645, 4th ed.
(*b*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 25.

devisee *and his heirs;* and in the same way, before the Wills Act, a gift to the devisee and the *heirs of his body* would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator (*c*). For the terms *heirs* and *heirs of the body* are words of limitation merely; that is, they merely mark out the estate, which the devisee, if living at the testator's death, would have taken,—in the one case an estate in fee simple, in the other an estate tail; and the heirs are no objects of the testator's bounty, further than as connected with their ancestor (*d*). Two cases have, however, been introduced by the Wills Act, in which the devise is to remain unaffected by the decease of the devisee in the testator's lifetime. The first case is that of a devise of real estate to any person for an *estate tail;* in which case, if the devisee should die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*e*). The other case is that of the devisee being *a child or other issue* of the testator dying in the testator's lifetime and leaving issue any of whom are living at the testator's death. In this case, unless a mere life estate shall have been left to the devisee, the devise shall not lapse, but shall take effect as in the former case (*f*).

No lapse now in two cases.

Estate tail.

Devise to issue of testator.

The construction of wills is the next object of our attention. In construing wills, the Courts have always borne in mind, that a testator may not have had the

Construction of wills.

(*c*) *Hodgson and Wife* v. *Ambrose*, 1 Dougl. 337.

(*d*) Plowd. 345; 1 Rep. 105; 1 Jarm. Wills, 338, 4th ed.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 32.

(*f*) Sect. 33. See Wms. Pers. Prop. 448, 15th ed.; *Johnson* v. *Johnson*, 3 Hare, 157; *Eccles* v. *Cheyne*, 2 Kay & J. 676; *Griffiths* v. *Gale*, 12 Sim. 354; *Eager* v. *Furnivall*, 17 Ch. D. 115. Estate duty attaches; *Re Scott*, 1900, 1 Q. B. 372.

same opportunity of legal advice in drawing his will, as he would have had in executing a deed. And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed (*g*). The decisions of the Courts, in pursuing this maxim, have given rise to a number of subsidiary rules, to be applied in making out the testator's intention; and when doubts occur, these rules are always made use of to determine the meaning; so that the true legal construction of a will is occasionally different from that which would occur to the mind of an unprofessional reader. Certainty cannot be obtained without uniformity, nor uniformity without rule. Rules, therefore, have been found to be absolutely necessary; and the indefinite maxim of observing the intention is now largely qualified by the numerous decisions which have been made respecting all manner of doubtful points, each of which decisions forms or confirms a rule of construction, to be attended to whenever any similar difficulty occurs. It is, indeed, very questionable, whether this maxim of observing the intention, reasonable as it may appear, has been of any service to testators; and it has certainly occasioned a great deal of trouble to the Courts. Testators have imagined that the making of wills, to be so leniently interpreted, is a matter to which anybody is competent; and the consequence has been an immense amount of litigation, on all sorts of contradictory and nonsensical bequests. An intention, moreover, expressed clearly enough for ordinary apprehensions, has often been defeated by some technical rule, too stubborn to yield to the general maxim, that the intention ought to be observed. Thus, in one case (*h*), a testator declared his intention to be, that his son should not sell or dispose of his estate for longer time than his life, and to that

Intention to be observed.

Technical rules.

Example of an intended life estate, held to be an estate tail.

(*g*) 30 Ass. 183 a; Y. B. 9 Hen. VI. 24 b; Litt. s. 586; Perk. s. 555; 2 Black. Comm. 381.

(*h*) *Perrin* v. *Blake*, 4 Burr. 2579, 1 W. Bl. 672, 1 Dougl. 343.

intent he devised the same to his son for his life, and after his decease to the heirs of the body of his said son. The Court of King's Bench held, as the reader would no doubt expect, that the son took only an estate for his life; but this decision was reversed by the Court of Exchequer Chamber, and it is now well settled that the decision of the Court of King's Bench was erroneous (*i*). The testator unwarily made use of technical terms, which always require a technical construction. In giving the estate to the son for life, and after his decease to the heirs of his body, the testator had, in effect, given the estate to the son *and the heirs of his body*. Now such a gift is an estate tail: and one of the inseparable incidents of an estate tail is, that it may be barred in the manner already described (*k*). The son was, therefore, properly entitled, not to an estate for life only, but to an estate tail, which would at once enable him to dispose of the lands for an estate in fee simple. In contrast to this case are those to which we have before adverted, in the chapter on estates for life (*l*). In those cases, an intention to confer an estate in fee simple was defeated by a construction, which gave only an estate for life: a gift of lands or houses to a person simply, without words to limit or mark out the estate to be taken, was held to confer a mere life interest. But, in such cases, the Courts, conscious of the pure technicality of the rule, were continually striving to avert the hardship of its effect, by laying hold of the most minute variations of phrases, as matter of exception. Doubt thus took the place of direct hardship; till the legislature thought it time to interpose. As we have seen, a remedy was provided by the Wills Act (*m*), which enacts (*n*), that where any real estate shall be devised to any person, without any words of limitation,

An intended fee simple held to be only an estate for life.

Wills Act.

(*i*) Fearne, C. R. 147—172.
(*k*) *Ante*, p. 98.
(*l*) *Ante*, p. 111.
(*m*) 7 Will. IV. & 1 Vict. c. 26.
(*n*) Sect. 28.

such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will. In these cases, therefore, the rule of law has been made to give way to the testator's intention; but the case above cited, in which an estate tail was given when a life estate only was intended, is sufficient to show, that rules still remain which give to certain phrases such a force and effect as can be properly directed by those only who are well acquainted with their power.

Gift in case of death without issue.

Another instance of the defeat of intention arose in the case of a gift of lands to one person, "and in case he shall die without issue," then to another. The Courts interpreted the words, "in case he shall die without issue," to mean "in case of his death, and of the failure of his issue:" so that the estate was to go over to the other, not only in case of the death of the former, leaving no issue *living at his decease*, but also in the event of his leaving issue, and his issue afterwards failing, by the decease of all his descendants. The Courts considered that a man might properly be said to be "dead without issue," if he had died and left issue, all of whom were since deceased; quite as much as if he had died, and left no issue behind him. In accordance with this view, they held such a gift as above mentioned to be, by implication, a gift to the first person and his issue, with a remainder over, on such issue failing, to the second. This was, in fact, a gift of an estate tail to the first party (*o*); for an estate tail is just such an estate as is descendible to the issue of the party, and will cease when he has no longer heirs of his body, that is, when his issue fails. Had there been no power of barring entails, this would no doubt have been a most effectual way of fulfilling to the utmost the testator's

Such a gift held to be an estate tail.

(*o*) 1 Jarm. Wills, 554, 4th ed.; *Machell* v. *Weeding*, 8 Sim. 4, 7.

intention. But, as we have seen, every estate tail in possession is liable to be barred, and turned into a fee simple, at the will of the owner. With this legal incident of such an estate, the Courts considered that they had nothing to do; and by this construction, they accordingly enabled the first devisee to bar the estate tail which they adjudged him to possess, and also the remainder over to the other party. He thus was enabled at once to acquire the whole fee simple, contrary to the intention of the testator, who most probably had never heard of estates tail, or of the means of barring them. This rule of construction had been so long and firmly established, that nothing but the power of Parliament could affect an alteration. This was done by the Wills Act, which directs (*p*) that in a will the words "die without issue," and similar expressions, shall be construed to mean a want or failure of issue in the lifetime, or at the death of the party, and not an indefinite failure of issue; unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a gift of an estate tail to such person or issue, or otherwise.

Intention defeated.

Wills Act.

From what has been said, it will appear that, before the above-mentioned alteration, an estate tail might have been given by will, by the mere implication, arising from the apparent intention of the testator, that the land should not go over to any one else, so long as the first devisee had any issue of his body. In the particular class of cases to which we have referred, this implication is now excluded by express enactment. But the general principle by which any kind of estates may be given by will, whenever an intention so to do is expressed, or clearly implied, still remains the same. In a deed, technical words are always required; to create an estate tail

Implication.

(*p*) Sect. 29: see *Re Edwards*, 1894, 3 Ch. 644.

by a deed, it is necessary, as we have seen (*q*), that the word *heirs*, coupled with *words of procreation*, such as heirs *of the body*, or the words *in tail* shall be made use of. So, we have seen that, to give an estate in fee simple, it is necessary, in a deed, to use the word *heirs*, or the words *in fee simple* (*r*), as words of limitation, to limit or mark out the estate. But in a will, a devise to a person and his seed (*s*), or to him and his issue (*t*), and many other expressions, are sufficient to confer an estate tail; and a devise to a man and his *heirs male*, which, in a deed, would be held to confer a fee simple (*u*), in a will gives an estate in tail male (*x*); for the addition of the word "male," as a qualification of heirs, shows that a class of heirs, less extensive than heirs general, was intended (*y*); and the gift of an estate in tail male, to which, in a will, words of procreation are unnecessary, is the only gift which at all accords with such an intention. So, even before the enactment directing that a devise without words of limitation shall be construed to pass a fee simple, an estate in fee simple was often held to be conferred, without the use of the word *heirs*. Thus, such an estate was given by a devise to one in *fee simple*, or to him *for ever*, or to him *and his assigns for ever* (*z*), or by a devise of all the testator's *estate*, or of all his *property*, or all his *inheritance*, and by a vast number of other expressions, by which an intention to give the fee simple could be considered as expressed or implied (*a*).

Gift of an estate tail by will.

Gift of a fee simple by will.

Uses and trusts.

The doctrine of uses and trusts applies as well to a will as to a conveyance made between living parties. Thus a devise of lands to A. and his heirs to the use of

(*q*) *Ante*, pp. 145, 202.
(*r*) *Ante*, pp. 145, 202.
(*s*) Co. Litt. 9 b; 2 Black. Comm. 115.
(*t*) *Martin* v. *Swannell*, 2 Beav. 249; 2 Jarm. Wills, 412, 4th ed.; 1258, 5th ed.
(*u*) *Ante*, p. 146.
(*x*) Co. Litt. 27 a; 2 Black. Comm. 115.
(*y*) 2 Jarm. Wills, 324, 4th ed.; 1169, 5th ed.
(*z*) Co. Litt. 9 b; 2 Black. Comm. 108.
(*a*) 2 Jarm. Wills, 274 *sq.*, 4th ed.

B. and his heirs, upon certain trusts to be performed by B., will vest the legal estate in fee simple in B.; and the Court will compel him to execute the trust; unless indeed, he disclaim the estate, which he is at perfect liberty to do (*b*). But, if any trust or duty should be imposed upon A., it will then become a question, on the construction of the will, whether or not A. takes any *legal* estate; and, if any, to what extent. If no trust or duty is imposed on him, he is a mere instrument for conveying the legal estate to B., filling the same passive office as a person to whom a feoffment or conveyance has been made to the use of another (*c*). From a want of acquaintance on the part of testators with the Statute of Uses (*d*), great difficulties have frequently arisen in determining the nature and extent of the estates of trustees under wills. In doubtful cases, the leaning of the Courts was to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust. But this doctrine having frequently been found inconvenient, provision has been made in the Wills Act (*e*), that, under certain circumstances, not always to be easily explained, the fee simple shall pass to the trustees, instead of an estate determinable when the purposes of the trust shall be satisfied.

Danger of ignorance of legal rules.

The above examples may serve as specimens of the great danger a person incurs, who ventures to commit the destination of his property to a document framed in ignorance of the rules, by which the effect of such document must be determined. The Wills Act, by the alterations above mentioned, has effected some improvement; but no Act of Parliament can give skill to the

(*b*) *Nicloson* v. *Wordsworth*, 2 Swanst. 365, 19 R. R. 86; *Urch* v. *Walker*, 3 My. & Cr. 702; *Siggers* v. *Evans*, 5 E. & B. 367, 380.

(*c*) 2 Jarm. Wills, 290—292, 4th ed.; 1137, 1139, 5th ed.; *Baker* v. *White*, L. R. 20 Eq. 166; *Re Brooke*, 1894, 1 Ch. 43; see *ante*, pp. 173, 203.

(*d*) 27 Hen. VIII. c. 10; *ante*, p. 171.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 30, 31.

unpractised, or cause everybody to attach the same meaning to doubtful words. The only way, therefore, to avoid doubts on the construction of wills, is to word them in proper technical language,—a task to which those only who have studied such language can be expected to be competent.

Devise to heir.

If the testator should devise land to the person who is his heir at law, it is provided by the Inheritance Act (*f*) that such heir shall be considered to have acquired the land as a devisee, and not by descent. Such heir, thus taking by *purchase* (*g*), will therefore become the stock of descent; and in case of his decease intestate, the lands will descend to *his* heir, and not to the heir of the testator, as they would have done had the lands *descended* on the heir. Before this Act, an heir to whom lands were left by his ancestor's will was considered to take by his prior title of descent as heir, and not under the will,—unless the testator altered the estate and limited it in a manner different from that in which it would have descended to the heir (*h*).

Real estate devised now vests in the personal representatives.

As we have seen (*i*), in the case of testators dying after the year 1897, their real estate vests at once in their executors, notwithstanding any testamentary disposition thereof; and the executors are empowered to dispose of the same to raise money for payment of their funeral and testamentary expenses and debts and their legacies, if charged on their real estate; and the devisee of lands takes no estate therein at law, though he has an interest in them in equity, until the executors have either assented to the devise in his favour or have expressly conveyed the lands to him. And if a testator has left no executor, his real estate will vest in his administrator *cum testamento annexo*, who will have the

(*f*) Stat. 3 & 4 Will. IV. c. 106, s. 3; see *Strickland* v. *Strickland*, 10 Sim. 374.

(*g*) *Ante*, p. 221.

(*h*) Watk. Descents, 174, 176 (229, 231, 4th ed.).

(*i*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218.

same powers in all respects as an executor (*k*). But where a testator died before the year 1898, the devise of his real estate was quite independent of the executors' assent or interference, unless the testator should either expressly or by implication have given his executors any estate in or power over the same. In modern times, however, the doctrine was broached, that if a testator had charged his real estate with the payment of his debts, such a charge gave by implication a power to his executors to sell his real estate for the payment of his debts. The author, elsewhere, attempted to show that this doctrine, though recognized in several modern cases, was inconsistent with legal principles (*l*); and in this he was supported by the great authority of Lord St. Leonards (*m*). In consequence, however, of the difficulties to which these cases gave rise, an Act was passed by which, where there is a charge of debts or legacies, the trustees in some cases and in other cases the executors of a testator were empowered to sell his real estate for the purpose of paying such debts or legacies. This Act, which is known as "Lord St. Leonards' Act" (*n*), provides (*o*) that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debts or legacy out of the estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator,

Devise of real estate was formerly independent of executors' assent.

Charge of debts.

Where trustees may sell or mortgage to pay testator's debts or legacies.

(*k*) Wms. Pers. Prop. 456, 15th ed.

(*l*) See the Author's Essay on Real Assets, c. 6.

(*m*) Sug. Pow. 120—122.

(*n*) Stat. 22 & 23 Vict. c. 35, passed 13th August, 1859.

(*o*) Sect. 14. The powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, and to any persons appointed to succeed to the trusteeship, either under any powers in the will, or by the Court; s. 15.

Where executors may sell or mortgage to pay debts or legacies.

raise such debts or legacy by sale or mortgage of the lands devised to them. But if any testator, who shall have created such a charge, shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the same power of raising the same moneys as is before vested in the trustees (*p*). And purchasers or mortgagees were not to be bound to inquire whether the powers thus conferred have been duly exercised by the persons acting in exercise thereof (*q*). But these provisions were not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act; nor were they to extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies; nor were they to affect the power of any such devisee to sell or mortgage as he or they might by law then do (*r*). In these cases the law was that the devisee might, in the exercise of his inherent right of alienation, either sell or mortgage the lands devised to him; but if legacies only were charged thereon, the purchaser or mortgagee was bound to see his money duly applied in their payment (*s*). If, however, the testator's debts were charged on the lands, then, whether there were legacies also charged or not, the practical impossibility of obliging the purchaser or mortgagee to look to the payment of so uncertain a charge exonerated him from all liability to do more than simply pay his money to the devisee on his sole receipt (*t*). The powers given by this Act are of course practically superseded, in the case of testators dying after

Devise in fee or in tail charged with debts.

Charges of legacies only.

Charge of debts.

(*p*) Sect. 16. Such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested.

(*q*) Sect. 17.

(*r*) Sect. 18. See *Re Wilson*, 2 Times L. R. 443. 34 W. R. 512.

(*s*) *Horn* v. *Horn*, 2 Sim. & Stu. 448; Essay on Real Assets p. 63.

(*t*) Essay on Real Assets, pp. 62, 63; *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

1897, by the more extensive powers over real estate now conferred on executors by the Land Transfer Act, 1897 (*u*); but they remain applicable in cases of death before 1898.

Executors now take freeholds vested in a sole trustee or mortgagee: and a power to convey freehold estate contracted to be sold.

As we have seen (*x*), under the Conveyancing Act of 1881, freehold estate of inheritance vested in any person solely upon any trust, or by way of mortgage, now devolves, on his death, to his personal representatives. And the same Act (*y*) empowers the tenant's personal representatives to convey the fee simple or other freehold interest descendible to his heirs general in any land for the purpose of giving effect to a contract for sale thereof, subsisting at his death and enforceable against his heir or devisee (*z*).

Wills in Middlesex and Yorkshire to be registered.

Wills of lands situate in Middlesex or Yorkshire or the town and county of Kingston-upon-Hull, must be duly registered in the county register, in order to operate as a complete and unavoidable conveyance. For the Registry Acts for those places (*a*) provided that a memorial of all wills of lands in those counties should be registered within six months after the death of every testator dying within the kingdom of Great Britain, or within three years after the death of every testator dying upon the seas or in parts beyond the seas; otherwise every such devise by will should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*b*). But in consequence of the construction placed upon these Acts by the Courts of Equity (*c*), if a purchaser or mortgagee from the heir of one, who held land in a register county, had had clear previous notice of a will

(*u*) *Ante*, pp. 218, 219.
(*x*) *Ante*, pp. 189, 236.
(*y*) Stat. 44 & 45 Vict. c. 41, s. 4; see Wms. Conv. Stat. 54—58.
(*z*) See *ante*, p. 183.
(*a*) Stats. 7 Anne, c. 20, s. 8; 2 & 3 Anne, c. 4, s. 20; 6 Anne, c. 62 (6 Anne, c. 35, in Ruffhead): 8 Geo. II. c. 6, s. 15. See *ante*, p. 206; Wms. Conv. Stat. 21—23.
(*b*) *Chadwick* v. *Turner*, 31 Beav. 634, L. R. 1 Ch. 310; Dart, V. & P. 771, 6th ed.
(*c*) See *ante*, pp. 206, 207.

devising the same land, he could not, by registering his deed, gain any priority over the devisees in respect of the equitable estate in the land (*d*). The Vendor and Purchaser Act, 1874 (*e*), provides (*f*), that where the will of a testator devising lands in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee, or by some one deriving title under him, shall, if registered before, take precedence of and prevail over, any assurance from the testator's heir at law. As we have seen (*g*), the old Yorkshire Registry Acts were repealed by the Yorkshire Registries Act, 1884 (*h*). By this Act, wills affecting lands in Yorkshire *may be* registered thereunder; and every will entitled to be registered under this Act shall have priority according to the date of the death of the testator, if the date of registration thereof be within, or under this Act to be deemed to be within (*i*), a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six months (*k*). This Act also provides for the registration of an affidavit of intestacy at any time after the expiration of six months from the death of a person holding land within Yorkshire and Kingston-upon-Hull; and enacts that, where any such affidavit of intestacy has been duly registered, any assurance for valuable consideration made or executed by any person who would be empowered to make or execute the same in case of such intestacy, and duly registered, shall have priority over

New enactment. relief to purchasers and mortgagees.

Registration in Yorkshire of affidavit of intestacy.

(*d*) Wms. Conv. Stat. 23, and n. (*q*).

(*e*) Stat. 37 & 38 Vict. c. 78.

(*f*) Sect. 8. See Wms. Conv. Stat. 21—24.

(*g*) *Ante*, p. 207.

(*h*) Stat. 47 & 48 Vict. c. 54. s. 51.

(*i*) See sect. 11. which provides for registration of notice of a will within six months after the testator's death, if the will itself cannot be registered within the same period.

(*k*) Sects. 4, 14, as amended by 48 & 49 Vict. c. 26, s. 4.

any will of the supposed intestate, the date of registration of which shall be subsequent to the date of registration of such assurance *or will* and not within or under this Act to be deemed to be within a period of six months after the death of the supposed intestate (*l*). As we have seen (*m*), this Act provides that no person claiming any legal or equitable interest under any priority given by the Act shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. *Sic.*

Succession Duty.

As a rule, every person succeeding to any beneficial interest in real property as heir, or under a will, upon any death which has occurred after the Succession Duty Act, 1853 (*n*), is charged with duty on the value of the succession at the rate stated in the note (*o*). Succession duty is a first charge on the interest of the

(*l*) Stat. 47 & 48 Vict. c. 54, s. 12. The words *or will* appear superfluous.

(*m*) *Ante*, p. 207.

(*n*) Stat. 16 & 17 Vict. c. 51, ss. 2, 10, 18, 54; this Act commenced on the 19th May, 1853.

(*o*) Where the successor is to the predecessor (who in the case of intestacy appears to be the last possessor (not the last purchaser: Hanson on Succession Duty, 239, 240, 3rd ed.), and in the case of a will is the testator):—

(1) Lineal issue or ancestor, £1 per cent.

(2) Brother or sister, or descendant of a brother or sister, £3 per cent.

(3) Brother or sister of the father or mother, or descendant of such brother or sister, £5 per cent.

(4) Brother or sister of the grandfather or grandmother, or descendant of such brother or sister, £6 per cent.

(5) In any other degree of collateral consanguinity, or a stranger in blood, £10 per cent.

No duty is payable on a succession by a husband to a wife, or *vice versâ*, or by any member of the royal family.

An additional duty of 10*s.* per cent. in case (1), and £1 10*s.* per cent. in the other cases, was imposed on successions on deaths occurring on or after the 1st of July, 1888; and an additional duty of £1 per cent. where the value of any succession on the death of any person dying on or after the 1st of June, 1889, exceeded £10,000, or the value of any succession to real property under the will or intestacy of any person so dying, together with any other benefit taken by the successor under such will or intestacy, exceeded the same sum: but these duties were abolished by the Finance Act, 1894. See stats. 51 Vict. c. 8, s. 21; 52 Vict. c. 7, ss. 6, 7; 57 & 58 Vict. c. 30, s. 1 and 1st schedule.

successor, and of all persons claiming in his right, in all the real property on which it is assessed; and is also a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him (*p*). Under this Act, the duty on a succession to real property is payable on the value (to be ascertained as directed in the Act) of an annuity equal to the *annual value* (*q*) of such property during the successor's life, or for any less period during which he may be entitled; and the duty is to be paid by eight equal half-yearly instalments, commencing at the end of twelve months after the successor shall have become entitled to the beneficial enjoyment of the property (*r*). But if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable; except in the case of a successor who shall have been competent to dispose by will (*s*) of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest (*t*). By the Finance Act, 1894 (*u*), a duty called estate duty is charged upon

Estate Duty.

(*p*) Stat. 16 & 17 Vict. c. 51, s. 42; see also s. 44, and stat. 52 Vict. c. 7, s. 12.

(*q*) *A.-G.* v. *Earl of Sefton*, 11 H. L. C. 257.

(*r*) By stat. 51 Vict. c. 8, s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further annual instalments with interest at £4 per cent. on the amount remaining unpaid.

(*s*) *A.-G.* v. *Hallett*, 2 H. & N. 368.

(*t*) Stat. 16 & 17 Vict. c. 51, s. 21.

(*u*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2, 22, 24. This Act has been amended by stats. 59 & 60 Vict. c. 28, ss. 14—24; 61 & 62 Vict. c. 10, ss. 13, 14; 63 Vict. c. 7, s. 14. See Wms. Pers. Prop. 387, 15th ed. Estate duty on real property may be paid, with interest at 3 per cent., by yearly or half-yearly instalments, extending over eight years from the death; but if the property be sold, the duty shall be paid on completion of the sale. Stats. 57 & 58 Vict. c. 30, s. 6 (8); 59 & 60 Vict. c. 28, s. 18.

the principal value of all real or personal property which passes, whether upon intestacy, by will or by settlement, on the death of any person dying after the 1st of August, 1894. The rate of duty is graduated according to the value of the estate as stated in the note (*x*); and to determine the rate of duty to be paid, all the property so passing must, as a rule, be aggregated so as to form one estate (*y*). Where property, in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition, taking effect after the 1st of August, 1894, passes thereunder on the death of the deceased to some person not "competent to dispose of the property" (*z*), a further estate duty (called settlement estate duty) is leviable at the rate of one per cent. on the principal value of the property so settled, except where the only life interest in the property after the death of the deceased, is that of a wife or husband of the deceased (*a*). Where estate duty is leviable on any real property, a part of the estate duty, proportionate to

Settlement estate duty.

(*x*) Stats. 57 & 58 Vict. c. 30, s. 17; 59 & 60 Vict. c. 28, s. 17; 63 Vict. c. 7, s. 13:—

Where the principal value of the Estate						At the rate per cent. of		
	£				£	£	s.	d.
Exceeds	100	and	does	not	exceed 500	1	0	0
,,	500	,,	,,	,,	1,000	2	0	0
,,	1,000	,,	,,	,,	10,000	3	0	0
,,	10,000	,,	,,	,,	25,000	4	0	0
,,	25,000	,,	,,	,,	50,000	4	10	0
,,	50,000	,,	,,	,,	75,000	5	0	0
,,	75,000	,,	,,	,,	100,000	5	10	0
,,	100,000	,,	,,	,,	150,000	6	0	0
,,	150,000	,,	,,	,,	250,000	6	10	0
,,	250,000	,,	,,	,,	500,000	7	0	0
,,	500,000	,,	,,	,,	1,000,000	7	10	0
,,	1,000,000	.....				8	0	0

(*y*) Stats. 57 & 58 Vict. c. 30, s. 4; 63 Vict. c. 7, s. 12.

(*z*) This means, with regard to land, not competent to dispose of the whole estate therein as tenant in fee simple or in tail or under a power exercisable for one's own benefit; see s. 22 (2, *a*).

(*a*) Stats. 57 & 58 Vict. c. 30, ss. 5, 17, 21 (4); 59 & 60 Vict. c. 28, s. 19; 61 & 62 Vict. c. 10, ss. 13, 14.

the value of such property, shall be a first charge thereon; except as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*b*). Where property is chargeable with estate duty, succession duty at the rate of one per cent. (*c*) is not leviable on any interest therein (*d*). But the Act makes succession duty payable on the *principal value* (*e*) (less the estate duty and expenses of paying the same) of any real property, where the successor is "competent to dispose of the property" (*f*).

(*b*) Stat. 57 & 58 Vict. c. 30, s. 9 (1); *Re Palmer*, 1900, W. N. 9.

(*c*) *Ante*, p. 257, n. (*o*).

(*d*) Sect. 1 and 1st schedule.

(*e*) See s. 6.

(*f*) Sect. 18: see note (*a*) above. In such case the succession duty is payable by the same instalments and with the same interest as estate duty on real estate; see note (*a*) above.

CHAPTER XI.

OF CREDITORS' RIGHTS.

In the present chapter it is proposed to consider the rights, which creditors may acquire, to take freeholds in their debtors' possession to satisfy their debts. The liability of an estate of freehold to alienation for debt has been already briefly noticed (*a*); and we have seen that it may arise either in the tenant's lifetime, or, in the case of estates of inheritance, after his death. Alienation for ordinary debts may take place in the tenant's lifetime, either in execution of a judgment against him or on his bankruptcy. But in the case of debts to the Crown, the debtor's lands may be taken, as well in his lifetime as after his death, under the special remedies, which the Crown has for the recovery of its debts. We will examine, first, the liability of an estate in fee simple to alienation for debt: then that of estates tail and of freehold estates not of inheritance; and will consider, lastly, the liability of trust estates to creditors.

Liability in respect of judgment debts.

First, then, with regard to the liability attached to an estate in fee simple to be seized for the tenant's debts in his lifetime, the mere contracting of a debt gives the creditor no charge on the debtor's property, but only the right to sue him personally (*b*). And it is not until the creditor has obtained the *judgment* of a court of justice in his favour that the debtor's property can be

(*a*) *Ante*, p. 80.

(*b*) Turner, L. J., *Johnson* v. *Gallagher*, 3 De G. F. & J. 494, 519, 520; James, L. J., *Pike* v. *Fitzgibbon*, 17 Ch. D. 451, 461. There was an exception, at common law, in the case of a debt to the Crown; see below.

Judgment debts.

taken, *in execution of the judgment* (*c*), to satisfy his claim. In our law, the judgment debts of a tenant in fee long affected his lands with a peculiar and extensive liability to be taken in execution, not only in his own hands, but also in the hands of purchasers from him. At the present time, however, a course of complicated legislation has ended in placing such restrictions on the exercise of judgment creditors' rights against their debtor's lands, as reduce to a *minimum* the possibility of any hardship being caused to a purchaser for value. The first enactment which gave to a judgment creditor a remedy against the lands of his debtor was made in the reign of Edward I. (*d*), shortly before the passing of the Statute of *Quia Emptores* (*e*), which sanctioned the full and free alienation of fee simple estates. By this enactment it is provided, that, when a debt is recovered or acknowledged in the King's Court (*f*), or damages awarded, it shall be thenceforth *in the election* of him that sueth for such debt or damages to have a writ of *fieri facias* unto the sheriff of the lands and goods (*g*), or that the sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) (*h*), and *the one half of his land*, until the debt be levied according to a reasonable price or extent. The writ issued by the Court to the sheriff, under the authority of this statute, was called a writ of *elegit*: so named, because it was stated in the writ that the creditor had elected (*elegit*) to pursue the remedy which the statute had thus provided for him (*i*). One moiety only of the land was allowed to be taken, because it was necessary, according to the feudal constitution of our law, that,

Writ of *elegit*.

(*c*) See *ante*, p. 24, n. (*c*).

(*d*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second.

(*e*) Stat. 18 Edw. I. c. 1.

(*f*) *Ante*, p. 9, n. (*e*).

(*g*) As to the writ of *fieri facias* see Wms. Pers. Prop. 97, 15th ed.

(*h*) Since the commencement of the year 1884, it has no longer been possible to take the *goods* of a debtor under a writ of *elegit*, and the writ has extended to lands and hereditaments only; see stat. 46 & 47 Vict. c. 52, s. 146, sub-s. 1.

(*i*) Co. Litt. 289 b; Bac. Abr. tit. Execution (C 2).

whatever were the difficulties of the tenant, enough land should be left him to enable him to perform the services due to his lord (*k*). The statute, it will be observed, was passed prior to the time when the alienation of estates in fee simple was sanctioned by Parliament; and there can be no doubt, that long after the passing of this statute the vendors and purchasers of landed property held a far less important place in legal consideration than they do at present. This circumstance may account for the somewhat harsh construction, which was soon placed on this statute, and which continued to be applied to it, until its replacement by an enlarged and amended Act of modern date (*l*). It was held that, if at the time when the judgment of the Court was given for the recovery of the debt, or awarding the damages, the debtor had lands, but afterwards sold them, the creditor might still, under the writ with which the statute had furnished him, take a moiety of the lands out of the hands of the purchaser (*m*). It thus became important for all purchasers of lands to ascertain, that those from whom they purchased had no *judgments* against them. For, if any such existed, one moiety of the lands would still remain liable to be taken out of the hands of the purchaser to satisfy the judgment debt or damages. It was also held that if the debtor purchased lands after the date of the judgment, and then sold them again, even these lands would be liable, in the hands of the purchaser, to satisfy the claims of the creditors under the writ of *elegit* (*n*). In consequence of the construction thus put upon the statute, judgment debts became incumbrances upon the title to every estate in fee simple, which it was necessary to discover and remove previously to every purchase. To facilitate purchasers and others in their

Construction of the statute.

(*k*) Wright's Tenures, 170.
(*l*) Stat. 1 & 2 Vict. c. 110.
(*m*) *Sir John de Moleyn's case.* Year Book, 20 Edw. III. 24 a.
(*n*) *Brace* v. *Duchess of Marlborough.* 2 P. Wms. 492; Sug. V. & P. 520; 3 Prest. Abst. 326, 334, 335.

Dockets.

search for judgments, an alphabetical docket or index of judgments was provided by an Act of William and Mary (*o*), to be kept in each of the Courts, open to public inspection and search. But, by an enactment of the present reign (*p*) these dockets have now been closed, and the ancient statute is, with respect to purchasers, virtually repealed (*q*).

Now closed.

Judgments Act. 1838.

The rights of judgment creditors against the lands of their debtors were remodelled by the Judgments Act, 1838 (*r*). The old statute extended to only one half of the lands of the debtor; but, by this Act, the whole of the lands, and all other hereditaments of the debtor, can be taken under the writ of *elegit* (*s*). The power of the judgment creditor to take lands out of the hands of purchasers was no longer left to depend on a forced construction, such as that applied to the old statute; for this Act expressly extends the remedy of the judgment creditor to lands of which the debtor shall *have been* seised or possessed at the time of entering up the judgment, *or at any time afterwards*. It was also expressly provided that a judgment should operate as a charge on such lands (*t*). But no judgment should by virtue of this Act affect any hereditaments as to purchasers, mortgagees, or creditors, unless registered against the debtor's name in an Index which the Act directed to be kept for the warning of purchasers, at the office of the Court of Common Pleas (*u*). By the Judgments Act, 1839 (*x*), this registration was required to be repeated every five years (*y*); and it was provided, in favour of

The whole of the lands can be taken.

Registry of judgments.

Re-registration.

(*o*) Stat. 4 & 5 Will. & Mary, c. 20, made perpetual by stat. 7 & 8 Will. III. c. 36.

(*p*) Stat. 2 & 3 Vict. c. 11. ss. 1, 2.

(*q*) See 1 Dart, V. & P. 525—530, 6th ed.

(*r*) Stat. 1 & 2 Vict. c. 110, amended by 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82: 18 & 19 Vict. c. 15; and 23 & 24 Vict. c. 38.

(*s*) Stat. 1 & 2 Vict. c. 110. s. 11.

(*t*) Sect. 13.

(*u*) Stats. 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 3; 18 & 19 Vict. c. 15, s. 10; Sug. V. & P. 530 *sq.*

(*x*) Stat. 2 & 3 Vict. c. 11. s. 4.

(*y*) But by the Judgments Act, 1855, the purchaser was bound

purchasers without notice (*z*) of any judgments, that no judgments, although duly registered, should affect any hereditaments as against such purchasers more extensively than a duly docketed judgment would have bound such purchasers before the Judgments Act, 1838 (*a*).

Protection to purchasers without notice.

Subsequent legislation has, however, very greatly modified the effect of these enactments. It was first provided, by an Act of 1860 (*b*), that no judgment to be entered up after the passing of the Act should affect any land as to a *bonâ fide* purchaser or mortgagee (whether with or without notice of such judgment), unless a writ or other due process of execution should have been issued and registered as mentioned in the Act (*c*) before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money, and unless the writ or process were executed within three calendar months from the time when it was registered. Then by

Later Acts abolishing lien of judgments.

if the judgment were registered within five years before the execution of the conveyance to him, although more than five years should have elapsed since the last previous registration: stat. 18 & 19 Vict. c. 15, s. 6. As to the priority of judgments *inter se*, see *Bearan* v. *The Earl of Oxford*, 6 De G. M. & G. 492; *Re Lord Keusington*, 29 Ch. D. 527.

(*z*) By the Judgments Acts, 1840 and 1855, purchasers were not to be affected by any judgments not duly registered and re-registered, of which they had notice: stats. 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5.

(*a*) Stat. 2 & 3 Vict. c. 11, s. 5; *Lane* v. *Jackson*, 20 Beav. 535. The effect of judgments under these Acts was extended to all decrees, orders or rules, made by the courts of equity and of common law, or in matters of bankruptcy or lunacy; stats. 1 & 2 Vict. c. 110, s. 18; 2 & 3 Vict. c. 11, ss. 4, 5; 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4—6. See *Jones* v. *Williams*, 11 A. & E. 157, 8 M. & W. 349; *Doe* v. *Amey*, 8 M. & W. 565; *Wells* v. *Gibbs*, 3 Beav. 399; *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321. As to entering satisfaction on judgments, see stat. 23 & 24 Vict. c. 115, s. 2.

(*b*) Stat. 23 & 24 Vict. c. 38, s. 1: passed 23rd July, 1860, and affecting judgments entered upon as well as after that date, since statutes take effect from the first instant of the day of their passing; Sug. V. & P. 530; *Tomlinson* v. *Bullock*, 4 Q. B. D. 231.

(*c*) By s. 2, this registration was required to be made in the judgment *creditor's* name, so that it was still necessary to search for judgments against the debtor's name in the registry above referred to.

Judgments Act, 1864.

the Judgments Act, 1864 (*d*), no judgment (*e*) to be entered up after the passing of the Act should affect any land, of whatever tenure, until such land should have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment (*f*). This Act required every writ, by virtue whereof any land *should have been* actually delivered in execution, to be registered against the debtor's name, and provided that no other registration of the judgment should be necessary for any purpose (*g*). But it was

(*d*) Stat. 27 & 28 Vict. c. 112, s. 1; passed 29th July, 1864; see *ante*, p. 265, n. (*b*).

(*e*) Including registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment: s. 2. The provisions of this Act, and of the previous Act of 1860, also extended to recognizances and statutes. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, whereby one acknowledges himself to owe to the Queen or some other a certain sum, and conditioned to be void on the happening of a particular event, as, if he or some other appear in court when required, keep the peace or pay a debt. Before the Act of 1860, recognizances duly enrolled bound all lands which the debtor had at the time or after; see stats. 13 Edw. I. c. 18; 29 Car. II. c. 3, s. 18; Bro. Abr. Recognisans, 4, 7; Bac. Abr. Execution (B); 2 Black. Comm. 341; 2 Wms. Saund. 9 a, n. (5); 2 Tidd's Practice, 1083, 9th ed.; Parke, B., *R.* v. *Ellis*, 4 Ex. 652, 662; Wms. Exors. 1006, 7th ed.; 865, 9th ed. Statutes merchant and staple, and recognizances in the nature of a statute staple were modes of charging lands with the payment of a debt under certain statutes, which, having long been obsolete, were repealed in 1863. See 2 Black. Comm. 160; Wms. Exors. *ubi sup.*; stat. 26 & 27 Vict. c. 125.

Recognizances.

Statutes Merchant and Staple.

(*f*) Under this Act, the judgment creditor acquired no right in the judgment debtor's lands until possession thereof had been delivered to him by the sheriff under the writ of *elegit*, or until he had got the sheriff's return to the writ, whereby an estate *by elegit* in the debtor's lands became vested in him; but upon such actual delivery in execution he acquired the charge given by the Act of 1838 on the lands; and the priorities of judgment creditors were determined by the dates on which their writs were placed in the sheriff's hands. See *Guest* v. *Cowbridge Railway Co.*, L. R. 6 Eq. 619; *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236; *Re Pope*, 17 Q. B. D. 743, 745, 751; *Re Hobson*, 33 Ch. D. 493; *Re Anthony*, 1892, 1 Ch. 450; *Johns* v. *Pink*, 1900, 1 Ch. 296.

(*g*) Stat. 27 & 28 Vict. c. 112, s. 3. In 1875 the office of the Court of Common Pleas became the office of the Common Pleas Division of the High Court of justice (*ante*, p. 164); and in 1879 this office was amalgamated with the Central Office of the Supreme Court, to which the registers of judgments and of writs of execution were then transferred, and where all subsequent registrations and searches were required to be made; stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Order lxi.

decided that the actual delivery in execution of any land was not avoided, although the writ were not subsequently registered (*h*). To remedy this, it was enacted by the Land Charges Registration and Searches Act, 1888 (*i*), that every writ or order affecting land (including hereditaments of any tenure) issued or made by any Court for the purpose of enforcing a judgment (*k*), and every delivery in execution or other proceeding taken in pursuance of any such writ or order shall be void, *as against a purchaser for value* (*l*) of the land, unless the writ or order is for the time being duly registered against the name of the person whose land is affected, in the Office of Land Registry (*m*). Registration under this Act ceases to have effect at the expiration of five years, but may be renewed, and, if renewed, has effect for five years from the date of the renewal (*n*). Lastly, by the Land Charges Act, 1900 (*o*), a judgment, whether obtained or entered into before or after the commencement of the Act (*p*), shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under the Act of 1888. And as from the commencement of the Act of 1900 the register of judgments under the Act of

Land Charges &c., Act. 1888.

Land Charges Act. 1900.

(*h*) *Re Pope*, 17 Q. B. D. 743. It was considered that registration was chiefly required for the purpose of obtaining an order for sale under section 4 of the Act; see below, p. 268.

(*i*) Stat. 51 & 52 Vict. c. 51, ss. 4, 5, 6.

(*k*) Including any order or decree having the effect of a judgment, except an order made by a court having jurisdiction in bankruptcy in exercise of that jurisdiction: s. 4.

(*l*) Including a mortgagee or lessee, or other person who for valuable consideration takes any interest in or charge on land: s. 4.

(*m*) Registration of a writ or order under this Act has the same effect as and makes unnecessary registration thereof in the Central Office under any other Act: s. 5 (1). Due provision is made for searches in the register established by this Act: ss. 15—17. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or a judge; stat. 53 & 54 Vict. c. 69, s. 19.

(*n*) Stat. 51 & 52 Vict. c. 51, s. 5 (3).

(*o*) Stat. 63 & 64 Vict. c. 26, s. 2 (1), also applying to a recognizance: *ante*, p. 266, n. (*e*).

(*p*) 1st July, 1901; s. 6.

1838 and the registers of writs under the Acts of 1860 and 1864 are closed (*q*), and the provisions of the Judgments Acts, 1838 to 1855, relating to the registration of judgments (*r*) and the above stated provisions of the Act of 1864 (*s*) are repealed (*t*).

Remedies of execution creditor.

Tenant by *elegit*.

We will now advert to the means by which a judgment creditor, who has taken his debtor's lands in execution, may realise his debt. First, he may hold the lands, as tenant by *elegit*, until the debt be satisfied out of the rents and profits (*u*); and this was formerly his only remedy (*x*). A tenancy by *elegit* is a chattel real, passing to the executor or administrator, not the heir (*y*), and the tenant was expressly provided by statute with the freeholder's remedy for dispossession (*z*). The Judgments Act, 1838, enabled the creditor to take proceedings in equity to realise his charge on the debtor's land (*a*). And now under the Judgments Act, 1864 (*b*), every creditor, to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment (*c*), may obtain an order for the sale of his debtor's interest in such land. The other judgment creditors, if any, are to be served with notice of the order for sale; and the proceeds of the sale are to be distributed amongst the persons who may be found entitled thereto, according to their priorities (*d*).

(*q*) Sect. 2 (3).
(*r*) *Ante*, pp. 264, 265.
(*s*) *Ante*, p. 266.
(*t*) Sect. 5.
(*u*) 2 Inst. 396; 2 Black. Comm. 161; 2 Wms. Saund. 72, note (6); Elphinstone and Clark on Searches, 67; Stat. 1 & 2 Vict. c. 110, s. 11; *Re Anthony*, 1892, 1 Ch. 450.
(*x*) See *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407, 417.
(*y*) Co. Litt. 43 b; see *ante*, p. 25.
(*z*) Stat. 13 Edw. I. c. 18.
(*a*) Stat. 1 & 2 Vict. c. 110, s. 13; *ante*, p. 264.
(*b*) Stat. 27 & 28 Vict. c. 112, s. 4. The application must be made in the Chancery Division by originating summons: R. S. C. (Nov. 1893), Order lv., rule 9 B.
(*c*) The Act here added, "and whose writ or other process of execution shall be duly registered:" but these words were repealed by the Land Charges Act, 1900.
(*d*) Sect. 5.

Summary of the law of judgments.

It appears from this long chain of legislation, that a judgment creditor can now take under the writ of *elegit* all hereditaments belonging to his debtor at the time of the judgment or at any time after; but from the commencement of the Land Charges Act, 1900 (*e*), no judgment of whatever date will be a charge on land until a writ or order for enforcing it has been duly registered. Without such registration, therefore, the judgment creditor will not acquire the statutory charge (*f*) upon the debtor's lands, even though the lands should have been actually delivered in execution. On the other hand, actual delivery of the lands in execution is still necessary in order to enable the creditor to obtain an order for sale under the Judgments Act, 1864 (*g*). And the actual delivery of lands in execution under an unregistered writ is not made void, except as against a purchaser for value (*h*); and appears therefore still to vest in the creditor an estate by *elegit* (*i*) valid as against the debtor himself, his representatives in law, and assigns by *voluntary conveyance*, though voidable in default of due registration of the writ as against purchasers from him for value. A judgment creditor should of course now register his writ directly it is obtained; and if he remain tenant by *elegit* for five years without having obtained a sale, he should duly re-register the writ (*k*).

Counties palatine.

Lands in either of the counties palatine of Lancaster or Durham were affected both by judgments of the Courts at Westminster, and also by judgments of the Palatine Court (*l*). These latter judgments had, within

(*e*) *Ante*, p. 267.
(*f*) *Ante*, p. 264.
(*g*) *Ante*, p. 268. The Land Charges Act, 1900, has left open the questions—(1) whether the statutory charge is acquired by the mere registration of a writ, which is not executed, and (2) whether an order for sale can be obtained when the writ has been executed but not registered.
(*h*) *Ante*, p. 267.
(*i*) *Ante*, p. 266, n. (*f*).
(*k*) See *ante*, p. 267.
(*l*) 2 Wms. Saund. 194.

the county palatine, the same effect as judgments of the Courts of Westminster; and an index for their registration was established in each of the counties palatine, similar to the index of judgments at the Common Pleas (*m*). And by an Act of 1855 (*n*) it was provided that no judgment *of any Court* should bind lands in the counties palatine, as against purchasers, mortgagees, or creditors, unless duly registered and re-registered in the Court of the county palatine in which the lands were situate. But the Acts of 1860, 1864, 1888 and 1900, altering the law of judgments (*o*), apply to lands in the counties palatine as well as elsewhere in England (*p*). Under the Middlesex and Yorkshire Registry Acts (*q*), before judgments could affect lands in either of those counties, they were required to be registered in the county register. But the necessity for so registering judgments appears to have been removed by the Act of 1864, depriving subsequent judgments of their lien on lands (*r*). And under the Land

Lands in Middlesex and Yorkshire.

(*m*) Stats. 1 & 2 Vict. c. 110, s. 21; 13 & 14 Vict. c. 43, s. 24.

(*n*) Stat. 18 & 19 Vict. c. 15, ss. 2, 3.

(*o*) *Ante*, pp. 264—266.

(*p*) In 1836 the palatinate jurisdiction within the county of Durham, which formerly belonged to the Bishop of Durham, was transferred to the Crown; stats. 6 & 7 Will. IV. c. 19; 21 & 22 Vict. c. 45. By the Judicature Acts of 1873—5, the jurisdiction of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham was transferred to the High Court of Justice: and that of the Lancaster Chancery Court of Appeal to the Court of Appeal, which is a branch of the Supreme Court; stats. 36 & 37 Vict. c. 66, ss. 16—18; 37 & 38 Vict. c. 83. But the Courts of Chancery of the counties palatine of Lancaster and Durham still exercise jurisdiction: see stats. 13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82; *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, as to Lancaster: 52 & 53 Vict. c. 47, as to Durham. Lands in the county palatine of Chester, and in the principality of Wales, were in 1830 placed exclusively within the jurisdiction of the Courts at Westminster; stat. 11 Geo. IV. & 1 Will. IV. c. 70, s. 14.

(*q*) Stats. 7 Anne, c. 20, s. 18, as to Middlesex; 6 Anne, c. 20, s. 5 (5 & 6 Anne, c. 18, s. 4, in Ruffhead), as to the West Riding of Yorkshire; 6 Anne, c. 62, s. 19 (6 Anne, c. 35, s. 19, in Ruffhead), as to the East Riding; 8 Geo. II. c. 6, s. 1, as to the North Riding: see *Beaham* v. *Keane*, 3 De G. F. & J. 318.

(*r*) Stat. 27 & 28 Vict. c. 112, s. 3; *ante*, p. 266.

Charges Act, 1900 (*s*), a writ or order affecting lands in Middlesex is not required to be registered in the Middlesex register. Under the Yorkshire Registries Act, 1884 (*t*), however, it seems that an execution creditor should register his writ in Yorkshire in order to secure undisputed priority over any subsequent assurance of the land (*u*). Judgments of county courts and other inferior courts must be removed into the High Court before they can affect freehold lands (*x*). And judgments of the superior (*y*) and of certain inferior (*z*) courts in England, Scotland or Ireland may now be rendered as effectual as judgments of similar courts in any other part of the United Kingdom.

Judgments of inferior courts.

Secondly, freeholds are subject to involuntary alienation for debt in the tenant's lifetime in the case of his bankruptcy. Bankruptcy is the name given to the judicial proceedings, first introduced by statutes of Henry VIII. and Elizabeth (*a*), by which a man may be released from his debts, after surrendering all his property to his creditors. By the Bankruptcy Act, 1883, when a debtor is adjudged bankrupt, the whole of his freehold as well as his personal estate, vests in the trustee under the Act, who is empowered to sell the same and divide the proceeds amongst the creditors who have proved their debts (*b*). And any real estate which may be acquired by or devolve on a bankrupt before his discharge vests at once in like manner in the trustee; and the bankrupt himself has no power to dispose

Bankruptcy.

(*s*) Stat. 63 & 64 Vict. c. 26, s. 4; see *ante*, p. 267.

(*t*) Stat. 47 & 48 Vict. c. 54, ss. 3, 4—6, 14.

(*u*) See Elphinstone and Clark on Searches, 139—141.

(*x*) See stats. 1 & 2 Vict. c. 110, s. 22; 18 & 19 Vict. c. 15, s. 8; 35 & 36 Vict. c. 86, schedule, s. 9; 51 & 52 Vict. c. 43, s. 151; Elphinstone and Clark on Searches, 53—56.

(*y*) By stat. 31 & 32 Vict. c. 54.

(*z*) By stat. 45 & 46 Vict. c. 31.

(*a*) Stats. 34 & 35 Hen. VIII. c. 4; 13 Eliz. c. 7; see Wms. Pers. Prop. 230, 15th ed.

(*b*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 54, 56, 58, 168; see Wms. Pers. Prop. 232—240, 242—244, 247, 250, 15th ed.

thereof (*c*). Also where a debtor is released from his debts by a composition or scheme of arrangement approved by the Court under the present bankruptcy law (*d*), all or any part of his property may by the terms of the composition or scheme be vested in the trustee appointed to carry out the same. Debtors frequently obtain a release from their debts by private arrangement with their creditors. But every assignment of property, or other deed or agreement of arrangement, made for the benefit of a man's creditors generally (otherwise than in pursuance of the bankruptcy law) is now void, unless duly registered in the Central Office under the Deeds of Arrangement Act, 1887 (*e*); and is void, as against a person becoming after the year 1888 a purchaser for value of any land or hereditaments comprised therein, unless also duly registered in the debtor's name in the Office of Land Registry under the Land Charges Act of 1888 (*f*). Both these registers are open to search (*g*). Before the Bankruptcy Act, 1861 (*h*), which first rendered non-traders, as well as traders, subject to the bankruptcy laws, a debtor might also be divested of his property on his insolvency, that is, on his taking the benefit of the Acts for the relief of insolvent debtors (*i*); in which event the whole estate

Composition or arrangement.

Insolvency.

(*c*) Stat. 46 & 47 Vict. c. 52, s. 44; *Re New Land, &c., Assn. & Gray*, 1892, 2 Ch. 138; *Bird v. Philpott*, 1900, 1 Ch. 822; see Wms. Pers. Prop. 244, 259, 262, 15th ed.

(*d*) Stat. 53 & 54 Vict. c. 71, s. 3, sub-ss. 16, 17; see Wms. Pers. Prop. 240, 241, 15th ed.

(*e*) Stat. 50 & 51 Vict. c. 57, ss. 4—6.

(*f*) Stat. 51 & 52 Vict. c. 51, ss. 2, 4, 7—9. Such a deed affecting lands in Middlesex need not, since the passing of the Land Charges Act, 1900, be registered in the Middlesex Register: stat. 63 & 64 Vict. c. 26, s. 4. An order of adjudication of bankruptcy does not require to be registered in Middlesex in order to pass the debtor's lands there situate to the trustee; *Re Calcott & Elvin's contract*, 1898, 2 Ch. 460.

(*g*) Stats. 50 & 51 Vict. c. 57, s. 12; 51 & 52 Vict. c. 51, ss. 16, 17.

(*h*) Stat. 24 & 25 Vict. c. 134, ss. 19—27, 69.

(*i*) Stats. 1 & 2 Vict. c. 110, ss. 23 *sq.*, replacing 7 Geo. IV. c. 57, continued and amended by 11 Geo. IV. & 1 Will. IV. c. 38; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102; all repealed by 24 & 25 Vict. c. 134, s. 230, and 32 & 33 Vict. c. 83,

became vested in the assignee under the Acts for the benefit of his creditors (*k*).

Alienation for debt after death.

Fee simple estates are also subject, after the tenant's death, to debts of all kinds contracted by him in his lifetime. This liability, too, has been established by very slow degrees (*l*). It appears that in Bracton's time, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy (*m*). But the spirit of feudalism, which attained to such a height in the reign of Edward I., appears to have infringed on this ancient doctrine; for we find it laid down by Britton, who wrote in that reign, that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so (*n*). On this footing the law of England long continued. It allowed any person, by any deed or writing under seal (called a special contract or specialty) (*o*) to bind or charge his heirs, as well as himself, with the payment of any debt, or the fulfilment of any contract; in such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfil the contract, to the value of the lands which had descended to him from the ancestor, but not further (*p*). The lands so descended were called *assets* by descent, from the French word *assez*, enough, because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor (*q*). If,

Heirs might anciently be bound by specialty.

Assets.

s. 20. See Wms. Pers. Prop. 265, 15th ed.

(*k*) See stats. 1 & 2 Vict. c. 110, ss. 37, 45; 5 & 6 Vict. c. 116, s. 7; 7 & 8 Vict. c. 96, ss. 4, 10; 10 & 11 Vict. c. 102, s. 5.

(*l*) See Co. Litt. 191 a, n. (1), vi. 9.

(*m*) Bract. 61 a; cf. Glanv. vii. 8; and see P. & M. Hist. Eng. Law, ii. 342—344; *ante*, p. 20.

(*n*) Britt. 64 b; Fleta, fo. 135.

(*o*) See *ante*, pp. 149—151.

(*p*) Bac. Abr. Heir and Ancestor (F); Co. Litt. 376 b.

(*q*) 2 Black. Comm. 244; Bac. Abr. Heir and Ancestor (I).

however, the heir was not expressly named in such bond or contract, he was under no liability (*r*). When the power of testamentary alienation was granted, a debtor, who had thus bound his heirs, became enabled to defeat his creditor, by devising his estate by his will to some other person than his heir; and, in this case, neither heir nor devisee was under any liability to the creditor (*s*). Some debtors, however, impelled by a sense of justice to their creditors, left their lands to trustees in trust to sell them for the payment of their debts, or which amounts to the same thing, charged their lands, by their wills, with the payment of their debts. The creditors then obtained payment by the bounty of their debtor; and the Court of Chancery, in distributing this bounty, thought that "equality was equity," and consequently allowed creditors by simple contract to participate equally with those who had obtained bonds binding the heirs of the deceased (*t*). In such a case the lands were called *equitable assets*. At length an Act of William and Mary made void all devises by will, as against creditors by specialty in which the heirs were bound, but not further or otherwise (*u*): but devises or dispositions of any lands or hereditaments for the payment of any real and just debt or debts were exempted from the operation of the statute (*x*). Creditors, however, who had no specialty binding the heirs of their debtor, still remained without remedy against either heir or devisee: unless the debtor chose of his own accord to charge his lands by his will with the payment of his debts; in which case, as we have seen, all creditors were equally entitled to the benefit. So that, till the early part of the present century, a landowner might incur as many debts as he pleased, and yet leave behind him an unencumbered estate in fee

Equitable assets.

(*r*) Dyer. 271 a. pl. 35; Plow. 457.
(*s*) Bac. Abr. *ubi sup.*
(*t*) *Parker* v. *Dee*. 2 Cha. Cas. 201: *Bailey* v. *Ekins*. 7 Ves. 319; 2 Jarm. Wills, 1426, 5th ed.
(*u*) Stat. 3 Will. & Mary. c. 14, s. 2, made perpetual by stat. 6 & 7 Will. III. c. 14.
(*x*) Stat. 3 Will. & Mary, c. 14, s. 4.

simple, unless his creditors had taken proceedings in his lifetime, or he had entered into any bond or specialty binding his heirs. At length, in 1807, the fee simple estates of deceased *traders* were rendered liable to the payment, not only of debts in which their heirs were bound, but also of their simple contract debts (*y*), or debts arising from contracts made without any sealed writing (*z*). By a subsequent statute (*a*), the above enactments were consolidated and amended, and facilities were afforded for the sale of such estates of deceased persons as were liable by law, or by their own wills, to the payment of their debts. But notwithstanding that the efforts of a Romilly were exerted to extend so just a liability, the lands of all deceased persons, not traders at the time of their death, continued exempt from their debts by simple contract, till the year 1833; when a provision, which, but a few years before, had been strenuously opposed, was passed without the least difficulty (*b*). All estates in fee simple, which the owner should not by his will have charged with, or devised subject to, the payment of his debts, were then rendered liable to be administered in the Court of Chancery, for the payment of all the just debts of the deceased owner, as well debts due on simple contract as on specialty. But a dead man's personal estate still remained primarily liable to his debts (*c*); and his personal and real assets were applicable in discharge of his liabilities in the order stated below (*d*). And out of respect to the ancient

Debts of deceased traders.

In 1833 lands became subject to all debts.

(*y*) By stat. 47 Geo. III. c. 74.
(*z*) See Wms. Pers. Prop. 155, 15th ed.
(*a*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47.
(*b*) Stat. 3 & 4 Will. IV. c. 104.
(*c*) *Ante*, p. 20.

(*d*) 1. The general personal estate not expressly or impliedly exempted:
2. Lands expressly devised on trust to pay debts:
3. Estates allowed to descend to the heir;
4. Real or personal property devised or bequeathed to any one charged with the debts; see *Re Salt*, 1895, 2 Ch. 203;
5. General pecuniary legacies;
6. Specific legacies and real estate devised, whether the devise

law, the Act provided that all creditors by special contract, in which the heirs were bound, should be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty in which the heirs were not bound, should be paid any part of their demands. If, however, the debtor should by his last will have charged his lands with, or devised them subject to, the payment of his debts, such charge was still valid, and every creditor, of whatever kind, had an equal right to participate in the produce (*e*). This anomaly was removed in 1869 by an Act providing that, in the administration of the estate of every person who shall die after that year, specialty debts shall not be entitled to any priority, but specialty and simple contract creditors shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether legal or equitable (*f*). As we have seen (*g*), under the Land Transfer Act, 1897 (*h*), a deceased person's real estate is now to be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate; but this is not to alter or

Former effect of a charge of debts by will.

All creditors now stand in equal degree.

were specific or residuary, *pro ratâ*; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136:

7. Real and personal property over which the deceased person had a general power of appointment, and which he had appointed to an appointee taking the same gratuitously: see *post*, Part II., Ch. III.:

See 2 Jarm. Wills, 622, 4th ed.; 1430, 5th ed.; 2 Seton on Decrees, 1406, 5th ed. It will be seen that in case of intestacy the whole of the personal estate must be exhausted before the real estate is applied in paying debts.

(*e*) See the Author's Essay on Real Assets.

(*f*) Stat. 32 & 33 Vict. c. 46, also providing that this shall not prejudice any lien, charge, or other security, to which any creditor may be entitled for the payment of his debt. It has lately been decided that, according to the true construction of stat. 38 & 39 Vict. c. 77, s. 10, a deceased person's debts are payable according to the rule applicable in bankruptcy, by which, after satisfaction in full of certain preferential claims, all other debts are payable *pari passu*; *Re Whitaker*, 1900, 2 Ch. 677, W. N. 239; see Wms. Pers. Prop. 208—212, n. (*z*), 15th ed. The contention there suggested as open having prevailed, the table of the order of payment of debts there given must be altered accordingly.

(*g*) *Ante*, p. 218.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 2 (3).

affect the order (*i*) in which real and personal assets are applicable for payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies (*k*).

Creditor's remedies after debtor's death.

The remedies of a creditor, after his debtor's death, are either to sue the debtor's executor or administrator at law, when execution can be had against the goods of the testator or intestate, or to apply under the equitable jurisdiction of the Court (*l*) for the administration by the Court of the deceased debtor's estate (*m*). To secure the benefit of a testamentary charge of debts on real estate, or of the Act making real estate assets for the payment of debts, a creditor was formerly obliged to resort to the latter remedy; when a sale or mortgage of the real estate would be decreed, if necessary, to raise money to pay the debt (*n*). A creditor by special contract binding the heir had also the remedy, seldom exercised, of suing the heir or devisee for the debt (*o*). The effect of the Land Transfer Act, 1897 (*p*), appears to be that a creditor suing his debtor's personal representatives at law may have execution of the deceased debtor's lands in like manner as he might have had execution of his goods at common law. But it has not yet been so decided; and in practice the creditor's equitable remedy is the more convenient, and is that usually pursued. Under the Bankruptcy Act, 1883, any creditor may now take proceedings to have the insolvent estate of his deceased debtor administered in bankruptcy.

Administration in bankruptcy of a deceased person's insolvent estate.

(*i*) Above, p. 275, n. (*d*).
(*k*) *Ante*, p. 214, n. (*j*).
(*l*) *Ante*, p. 275.
(*m*) Wms. Pers. Prop. 104, 434, 15th ed.
(*n*) See Seton on Decrees, 1184 *sqq.*, 5th ed.; *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Pimm* v. *Insall*, 1 Mac. & G. 449; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567; *Price* v. *Price*, 35 Ch. D. 297.
(*o*) See stat. 11 Geo. IV. & 1 Will. IV. c. 47, ss. 2—8; Shelford's Real Property Statutes, pp. 366—371, 9th ed.; Wms. Conv. Stat. 234, 235.
(*p*) Stat. 60 & 61 Vict. c. 65, s. 2 (2, 3); *ante*, p. 214.

When an order is made for the administration in bankruptcy of a deceased debtor's estate, his property (real as well as personal) vests in the official receiver of the Court as trustee, and then in the trustee appointed by the creditors. And the trustee is empowered to realise the same by sale or otherwise, and distribute the proceeds among the creditors of the deceased, as in the case of bankruptcy (*q*).

Crown debts.

The Crown is, by Royal prerogative and by Statute, invested with various special privileges for the recovery of the debts due to it, besides the ordinary creditor's remedies. Thus a Crown debtor's freeholds in fee simple, in the hands of himself, his heirs or devisees (*r*), may be seized, as well as his body (*s*) and goods, in satisfaction of any debt due to the Crown under process duly issued for the purpose (*t*). And debts due, or which might have become due, to the Crown, from persons who were accountants to the Crown (*u*), and debts of record (*x*), or by specialty (*y*) in form prescribed by statute (*z*), due from other persons to the Crown were formerly binding

(*q*) Stat. 46 & 47 Vict. c. 52. s. 125, amended by 53 & 54 Vict. c. 71. s. 21 (3); *ante*, p. 271.

(*r*) *R.* v. *The Estate of G. Hassell*, McCleland, 105.

(*s*) See *A.-G.* v. *Edmunds*, 22 L. T. N. S., 667; *Re Smith*, 2 Ex. D. 47.

(*t*) 3 Black. Comm. 420; Manning's Exchequer Practice, pt. i., bk. i., 2nd ed.; Chitty on the Prerogative of the Crown, ch. xii.; stat. 28 & 29 Vict. c. 104. ss. 47, 51.

(*u*) Stats. 13 Eliz. c. 4; 25 Geo. III. c. 35; Co. Litt. 191 a, n. (1). vi. 9, 209 a, n. (1); Sug. V. & P. 544.

Debts of record.

(*x*) These are debts appearing to be due by matter of record; that is, by the evidence of any *court of record*, properly a court, of which the proceedings are enrolled or recorded, and the records of which are indisputable evidence of its proceedings. Judgment debts and recognizances (see *ante*, pp. 261, 266 & n. (*e*)) are debts of record; so are debts found to be due to the Crown by the verdict of an inquest of office held for the purpose. See Glanv. viii. 5—11; Bract. 156 b. 288 b, 289; Britton, liv. i. ch. 1, §§ 7—12. ch. 28, § 1; Co. Litt. 117 b. 260 a; Black. Comm. ii. 464. iii. 24; Manning's Exchequer Practice, 1, 36 *sq.*, 2nd ed.; Chitty on the Prerogative of the Crown, 265—271, 293; P. & M. Hist. Eng. Law. ii. 666.

(*y*) *Ante*, p. 273.

(*z*) Stat. 33 Hen. VIII. c. 39. ss. 36, 37, 52 (ss. 50—56, 75 in Ruffhead); see Chitty, Prerogative, 265, 293.

on their estates in fee simple when sold, as well as when devised by will, or suffered to descend to the heir at law (*a*). Simple contract debts (*b*), however, due to the Crown from a vendor of lands, who was no public accountant to the Crown, were not binding on the purchaser unless he had notice of them (*c*). But by the Judgments Act, 1839 (*d*), no liabilities to the Crown by record, specialty, or accountantship incurred after the 3rd of June, 1839, should affect any lands as to purchasers or mortgagees unless duly registered in the index of Crown debtors and accountants (*d*). And by the Crown Suits Act, 1865 (*e*), no such liabilities to the Crown incurred after the 1st of November, 1865, should affect any land as to a *bonâ fide* purchaser for valuable consideration or a mortgagee, whether he should have or have not notice of the same, unless a writ or process of execution had been issued and registered (*f*) before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money. But by the Land Charges Act, 1900 (*g*), these registers are

Liabilities to the Crown no longer a charge on lands.

(*a*) By stats. 2 & 3 Vict. c. 11. s. 10, and 12 & 13 Vict. c. 89. any two of the commissioners of the Treasury were empowered to certify that any lands of any Crown debtor or accountant should be held by the purchaser or mortgagee thereof discharged from all further claims of the Crown in respect of any debt or liability of the debtor or accountant to whom the lands belonged. And by stats. 16 & 17 Vict. c. 107, ss. 195—197 ; 23 & 24 Vict. c. 115. s. 1 ; and 39 & 40 Vict. c. 36, ss. 167, 288, a similar power was given to any two of the commissioners or principal officers, or the only commissioner or principal officer, of any public department with respect to any Crown bond or other security concerning or incident to any such department.

(*b*) *Ante*, pp. 81, 274.

(*c*) *King* v. *Smith*, Wightw. 34 ; *Cashord* v. *A.-G.*, 6 Price, 411, 473—476.

(*d*) Stat. 2 & 3 Vict. c. 11, s. 8. By stat. 22 & 23 Vict. c. 35, s. 22, re-registration every five years was required. This register was originally in the office of the Court of Common Pleas, but was transferred in 1879 to the Central Office of the Supreme Court ; *ante*, p. 266, n. (*g*).

(*e*) Stat. 28 & 29 Vict. c. 104, ss. 4, 48, 49, also providing that no other registration of the writ or process or of the debt or liability should be necessary.

(*f*) Originally in the office of the Court of Common Pleas, but since 1879 in the Central Office of the Supreme Court, *ante*, p. 266, n. (*g*).

(*g*) Stat. 63 & 64 Vict. c. 26, s. 2, repealing the above-mentioned provisions of the Acts of 1839 and 1865 as from that date.

closed as from the commencement of the Act (*h*) ; after which a judgment or recognizance (*i*) obtained or entered into on behalf of the Crown, and any inquisition finding a debt due to the Crown (*k*), and any obligation or specialty made to and any acceptance of office from or under the Crown, whatever be the date of the same, shall not operate as a charge on lands, unless or until writ or order for the purpose of enforcing the same is registered under the Land Charges Act of 1888 (*l*). And the provisions of this Act, making void the delivery of lands in execution as against purchasers for value if the writ or order be not duly registered (*m*), are extended to every writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment obtained on behalf of the Crown and every delivery in execution, or other proceeding taken in pursuance of any such writ or order.

Conveyances for defrauding creditors.

By a statute of the reign of Elizabeth, conveyances of landed estates, and also of goods, made for the purpose of delaying, hindering or defrauding creditors, are void as against them ; unless made upon *good*, which here means *valuable*, consideration (*n*), and *bonâ fide*, to any person not having, at the time of the conveyance, any notice of such fraud (*o*). Such conveyances of land are therefore of no avail against the claim of a creditor to take the land in execution, or against the title of the debtor's trustee in bankruptcy, or against creditors who take proceedings to secure payment of their debts out of the debtor's estate after his death (*p*).

(*h*) 1st July, 1901 ; see *ante*, p. 267, n. (*p*).

(*i*) *Ante*, pp. 261, 266, & n. (*e*).

(*k*) *Ante*, p. 278, n. (*x*).

(*l*) Stat. 51 & 52 Vict. c. 51, s. 6 ; *ante*, p. 267.

(*m*) Stat. 63 & 64 Vict. c. 26, s. 3.

(*n*) *Ante*, p. 78.

(*o*) Stat. 13 Eliz. c. 5 ; *Twyne's case*, 3 Rep. 81 a, 1 Smith's Leading Cases, 1 ; *Spencer* v. *Slater*, 4 Q. B. D. 13 ; *Re Johnson*, *Golden* v. *Gillam*, 20 Ch. D. 389 ; *Halifax Joint Stock Banking Co.* v. *Gledhill*, 1891. 1 Ch. 31.

(*p*) *Richardson* v. *Smallwood*, Jac. 552 ; *Re Ridler*, 22 Ch. D. 74.

Fraudulent conveyances of property are also void, as against the trustee in bankruptcy of the conveying party, under the bankruptcy laws (*q*). And by the Bankruptcy Act, 1883 (*r*), any voluntary settlement of property (*s*) shall, if the settlor becomes bankrupt within two years after the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the settlement, be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof (*t*). But the title of a *bonâ fide* purchaser for value from a beneficiary under any settlement so liable to be avoided will not be displaced by the subsequent bankruptcy of the settlor, even though the purchaser had notice that the settlement was voluntary (*u*).

Alienation of estate tail for debt.

With regard to the alienation of an estate tail for debt, under the old law of judgments (*x*) lands held for an estate tail could not be seized under a writ of *elegit* for a longer time than the life of the tenant in tail, against whom judgment for debt or damages had been recovered (*y*). But by the Judgments Act, 1838, a judgment debt (*z*) was made a charge binding on the lands

Judgment debts.

(*q*) See Wms. Pers. Prop. 232. 235. 15th ed.: notes to *Twyne's case*, 1 Smith. L. C.

(*r*) Stat. 46 & 47 Vict. c. 52. s. 47, replacing 32 & 33 Vict. c. 71, s. 91. avoiding similar settlements by *traders*.

(*s*) Including any conveyance or transfer of property, but excepting settlements on the settlor's wife or children of property accrued to him after marriage in right of his wife.

(*t*) *Ex parte Huxtable, Re Conibeer*, 2 Ch. D. 54; *Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622; *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; *Sanguinetti* v. *Stuckey's Bank*, 1895, 1 Ch. 176.

(*u*) *Re Vansittart*, 1893, 2 Q. B. 377; *Re Brall, ib.* 381; *Re Carter & Kenderdine's contract*, 1897, 2 Ch. 776.

(*x*) *Ante*, pp. 261—264.

(*y*) *Anderson's case*, 7 Rep. 21.

(*z*) See *ante*, p. 264, n. (*y*).

of the debtor, as against the issue of his body, and also as against all other persons whom he might, without the assent of any other person, cut off and debar from any remainder or reversion (*a*). As we have seen by the Judgments Act, 1864, no judgment thereafter entered up should affect any land, until the land had been actually delivered in execution; by the Land Charges Act, 1888, actual delivery in execution is made void, as against purchasers, unless the writ be duly registered: and by the Land Charges Act, 1900, as from the 1st of July, 1901, a judgment shall not operate as a charge on land unless or until a writ or order for the purpose of enforcing it is duly registered under the Land Charges Act, 1888. Such registration therefore will thenceforth be necessary in order that a judgment creditor may acquire an interest binding the lands, of which his debtor is tenant in tail, as against those whose rights would be barred by a disentailing assurance (*b*). An estate tail may also be barred and disposed of on the bankruptcy of a tenant in tail, for the benefit of his creditors, to the same extent as he might have barred or disposed of it for his own benefit (*c*). If, however, a tenant in tail die before any judgment creditor has acquired a charge on his lands, and without having been adjudged bankrupt (*d*), the entailed lands will no longer be subject to his debts generally; unless indeed it should be held that the Land Transfer Act, 1897 (*e*), has altered the law in this respect. But there is an exception in the case of certain Crown debts (*f*). For, by a Statute of Henry VIII. (*g*), estates tail were charged, in the hands

Bankruptcy of tenant in tail.

(*a*) Stat. 1 & 2 Vict. c. 110, s. 13. See *Lewis* v. *Duncombe*, 20 Beav. 398; Sug. V. & P. 526; *Re Anthony*, 1893, 3 Ch. 498, 501, 502.

(*b*) *Ante*, pp. 266, 267.

(*c*) Stats. 3 & 4 Will. IV. c. 74, ss. 56—73; 46 & 47 Vict. c. 52, s. 56, sub-s. 5.

(*d*) See stat. 3 & 4 Will. IV. c. 74, s. 65.

(*e*) Stat. 60 & 61 Vict. c. 65, part i.; see *ante*, pp. 108, 214, 220.

(*f*) 1 Rolle Abr. 841 (F); 7 Rep. 21.

(*g*) 33 Hen. VIII. c. 39, s. 52 (s. 75 in Ruffhead); Chitty on the Prerogative of the Crown, 299.

of the heir, with debts due from his ancestor to the Crown by judgment, recognizance, obligation or other specialty (*h*), although the heir should not be comprised therein. And all arrears and debts due to the Crown, by accountants to the Crown, whose yearly or total receipts exceed three hundred pounds, were, by a Statute of Elizabeth (*i*), placed on the same footing (*k*).

Involuntary alienation of life estate.

A life estate is liable during the tenant's life to be taken to satisfy any judgment debt of his, in the same manner as an estate in fee simple (*l*). And it is similarly liable to vest in the creditors' trustee on his bankruptcy (*m*). But it is not in any way subject to the tenant's debts after his death. Determinable life estates are not subject to the tenant's debts after their determination (*n*). Estates *pur autre vie* are liable to alienation for debt in the tenant's lifetime in the same manner as other freehold estates (*o*); and after his death, they continue liable to his debts during the remainder of the *cestui que vie* (*p*).

Estates *pur autre vie.*

Judgment creditor's rights against trust estates.

Judgment creditors have the following rights against their debtors' equitable or trust estates:—(1) They may by statute take lands and hereditaments held on a simple trust (*q*) for the debtor under the writ of *elegit*. This remedy was first given by the Statute of Frauds (*r*), and was enlarged by the Judgments Act, 1838. By this Act, execution may be delivered, under the writ of *elegit*,

(*h*) *Ante*, pp. 266, 273.

(*i*) Stat. 13 Eliz. c. 4; and see 25 Geo. III. c. 35; Chitty, Prerogative, 294, 295.

(*k*) It does not appear that this liability is removed by stat. 63 & 64 Vict. c. 26, s. 2: *ante*, p. 279.

(*l*) *Ante*, pp. 261—269.

(*m*) *Ante*, p. 271.

(*n*) See *ante*, pp. 82, 127.

(*o*) *Ante*, pp. 261—269.

(*p*) *Ante*, p. 130.

(*q*) *Ante*, p. 178.

(*r*) Stat. 29 Car. II. c. 3, s. 10, which enabled the sheriff to deliver execution unto the judgment creditor of all such lands and hereditaments as any *other* person or persons were seised or possessed of *in trust for* the judgment debtor *at the time of execution sued*: see *Hunt* v. *Coles*, Com. 226; *Harris* v. *Pugh*, 4 Bing. 335, 12 J. B. Moore, 577.

of all such lands and hereditaments as the person against whom execution is sued, *or any person in trust for him*, shall have been seised or possessed at the time of entering up the judgment or at any time afterwards (*s*). (2) Judgment creditors may obtain what is called *equitable execution*. This originated in the relief which the Court of Chancery used to give to a judgment creditor, who had sued out a writ of *elegit* to take the debtor's land at law, but was prevented from executing it by the fact that the legal estate was outstanding in some other, who was not trustee for the debtor simply (*t*). In such cases the creditor might have obtained the appointment by the Court of a receiver of the rents and profits of the debtor's equitable estate in the land (*u*). The jurisdiction of the present High Court of Justice (*x*) to appoint a receiver was enlarged by the Judicature Acts (*y*). And now it appears that a judgment creditor may obtain equitable execution by means of an order for the appointment of a receiver of the profits of his debtor's interest in land, whenever there are circumstances to hinder the convenient operation of his legal remedy by *elegit* (*z*); and there is no necessity for him to sue out an *elegit* in the first instance (*a*).

Equitable execution.

As judgments were enforceable in equity under the old law, they were regarded as charges in equity upon equitable estates in land, and therefore binding upon all who succeeded to the judgment debtor's estate, except

How far judgments are charges upon equitable estates.

(*s*) Stat. 1 & 2 Vict. c. 110, s. 11.

(*t*) *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407; Mitford on Pleading, 126 (148, 5th ed.); Lewin on Trusts, 646 *sq.* 6th ed.: 977 *sq.* 10th ed.

(*u*) 19 Ves. 633; 2 Swanst. 137, 155; Daniell, Ch. Pr. 1563, 1564, 5th ed.

(*x*) *Ante*, p. 164.

(*y*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 8; see *Holmes* v. *Millage*, 1893, 1 Q. B. 551.

(*z*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Smith* v. *Cowell*, 6 Q. B. D. 75; *Salt* v. *Cooper*, 16 Ch. D. 544; *Re Pope*, 17 Q. B. D. 743; *Re Shephard*, 43 Ch. D. 131; *Lerasseur* v. *Mason & Barry*, 1891, 2 Q. B. 73; *Cadogan* v. *Lyric Theatre*, 1894, 3 Ch. 338.

(*a*) *Ex parte Evans*, *Re Watkins*, 13 Ch. D. 252.

those who took it as purchasers for value without notice of the judgment (*b*). The Judgments Act, 1838, expressly made judgments a charge on all hereditaments to which the judgment debtor should at the time of entering up judgment, or at any time afterwards, be entitled for any estate or interest whatever at law or in equity (*c*). But, as we have seen, under this Act purchasers were not to be affected by judgments, unless duly registered (*d*). The Acts of 1839 and 1860, before referred to (*e*), further protected purchasers of equitable as well as legal estates (*f*). And by the Judgments Act, 1864, no subsequent judgment should affect any land, until actual delivery thereof in execution. This was held to take place in the case of equitable execution (*g*), when the judgment creditor obtained an order for the appointment of a receiver; and he had no charge until then (*h*). As we have seen, the Land Charges Act, 1888, has made it requisite to register the writ or order enforcing a judgment in the office of Land Registry: or else it will be void as against purchasers for value (*i*): and under the Land Charges Act, 1900, the judgment will not without such registration, operate as a charge on the debtor's interest in the land.

Bankruptcy of *cestui que trust*.

Equitable estates are liable to involuntary alienation on the bankruptcy of the person entitled thereto, in the same manner as his estates at law (*k*). But on the bankruptcy of a trustee, the legal estate in any property, of which he is trustee for any other person, does not pass to the trustee for his creditors, but remains vested in him (*l*).

—of trustee.

(*b*) Sug. V. & P. 518: Lewin on Trusts, 653, 6th ed.; 984, 10th ed.: *ante*, p. 179.
(*c*) Stat. 1 & 2 Vict. c. 110, s. 13: *ante*, p. 264.
(*d*) Sect. 19: *ante*, p. 264.
(*e*) *Ante*, pp. 264, 265.
(*f*) Sug. V. & P. 535.
(*g*) *Ante*, p. 266.
(*h*) *Hatton* v. *Haywood*, L. R. 9 Ch. 229; and cases cited in notes (*y*) (*z*) to p. 284, *ante*.
(*i*) *Ante*, pp. 267, 282.
(*k*) *Ante*, p. 271.
(*l*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168. The same rule was formerly applied to cases of insolvency: *Sims* v. *Thomas*, 12 A. & E. 536.

Liability of trust estates after death.

The Statute of Frauds.

Trust estates in fee simple are also liable, like estates at law, to alienation for the payment of the owner's debts after his death. By the Statute of Frauds it was provided, that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, such trust should be assets by descent, and the heir should be chargeable with the obligation of his ancestors for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended (*m*).

Subsequent statutes.

And the subsequent statutes to which we have before referred, for preventing the debtor from defeating his bond creditor by his will, and for rendering the estates of all persons liable on their decease to the payment of their just debts of every kind, apply as well to equitable or trust estates as to estates at law (*n*).

Crown debts.

Trust estates are subject to debts due to the Crown in the same manner and to the same extent as estates at law (*o*). And in the case of equitable estates tail and for life, the liability for the owner's debts is similar to that attached to the like estates at law (*p*).

Lis pendens.

In connection with creditors' rights against purchasers of land, it may be mentioned that actions at law or in equity respecting lands will bind a purchaser, as well as the tenant's heir or devisee; that is, he must abide by the result, although he may be ignorant that any such proceedings are depending (*q*). Provision was accordingly

(*m*) Stat. 29 Car. II. c. 3, s. 10. Before this provision the Court of Chancery had refused to give the bond creditor any relief; *Bennet* v. *Box*, 1 Ch. Ca. 12; *Prat* v. *Colt*, *ib.* 128. These decisions, in all probability, gave rise to the above enactment. See 1 Wm. Black. 159; 1 Sand. Uses, 276 (289. 5th ed.).

(*n*) Stats. 3 Will. & Mary, c. 14, s. 2; 47 Geo. III. c. 74; 11 Geo. IV. & 1 Will. IV. c. 47; 3 & 4 Will. IV. c. 104; 32 & 33 Vict. c. 46; 46 & 47 Vict. c. 52, s. 125; 60 & 61 Vict. c. 65, part i.: *ante*, pp. 273—277.

(*o*) *The King* v. *Smith*, Sug. V. & P., Appx. No. 15, p. 1098, 11th ed.; Chitty on the Prerogative of the Crown, 296.

(*p*) Sug. V. & P. 524, 538.

(*q*) Co. Litt. 344 b; *Anon.*, 1 Vern. 318; *Hiern* v. *Mill*, 13 Ves.

made by the Judgments Act, 1839, for the registration of every *lis pendens*; and no *lis pendens* binds a purchaser or mortgagee without express notice thereof, unless and until it is duly registered; and the registration to be binding must be repeated every five years (*r*). This registration is now made in the Central Office of the Supreme Court (*s*).

Searches.

In consequence of the above-mentioned laws, it has been the practice to cause a search to be made, before every purchase or mortgage of freeholds, in the registers of judgments, writs and orders affecting land, and pending actions, and also of Crown debts and writs of execution, if there be reason to suppose that the owner of the property has been a Crown debtor or accountant (*t*). And if the search disclose any registered incumbrance affecting the land, it must be got rid of, before the sale or mortgage can be safely completed. After the commencement of the Land Charges Act, 1900, it will be unnecessary to search for judgments or Crown debts or writs (*u*).

120, 9 R. R. 149; 3 Prest. Abst. 354; *Bellamy* v. *Sabine*, 1 De G. & J. 566.

(*r*) Stat. 2 & 3 Vict. c. 11. s. 7; see *Price* v. *Price*, 35 Ch. D. 297; stat. 51 & 52 Vict. c. 51. ss. 5, 6. As to vacating such registration, see stat. 30 & 31 Vict. c. 47. s. 2.

(*s*) See *ante*, p. 266, n. (*g*).

(*t*) *Ante*, pp. 264, 267, 279. See Sug. V. & P. 537, 538, 543; 1 Dart, V. & P. 523, 524, 557, 562, 564, 6th ed.: Elphinstone & Clark, Searches, 50, 88, 93, 147 *sq.*, and Appx. on Land Charges Act of 1888, pp. 17, 18. Under stats. 45 & 46 Vict. c. 39. s. 2, and 51 & 52 Vict. c. 51. s. 17, official searches in these registers may be directed, and a certificate (which in favour of a purchaser or mortgagee is to be conclusive) obtained of the result of any such search. See Wms. Conv. Stat. 261 *sq.*: Elphinstone & Clark, Searches, 166—168.

(*u*) See *ante*, pp. 266, 269, 279, 280, 285.

CHAPTER XII.

OF PERSONAL CAPACITY.

It has been mentioned (*a*) that a tenant of lands may be prevented by personal incapacity from exercising the right of alienation, which is now regarded as inherent in ownership (*b*). Let us now consider what persons have the legal capacity to purchase, hold and dispose of an estate in land; the word *purchase* being here used in its legal meaning (*c*), which includes the acquisition of land under a will or a voluntary conveyance, as well as on a sale. It should be noted that capacity so to *purchase* lands merely indicates that a conveyance of land to the person capable will give him the legal estate therein: it does not include capacity to *buy* land, in the common sense of the word. That is a matter depending on capacity to contract. It will therefore be useful to inquire as well, what persons may contract with regard to land.

Persons natural and artificial.

Persons are either natural—men, women and children—or artificial, as corporations. All natural persons, including infants, lunatics, married women, convicts and, at the present day (*d*), aliens, are capable of purchasing and holding lands. And, as a general rule, any natural person may dispose freely of the land he holds (*e*), and may contract with regard to land. To this rule there are exceptions in the case of infants, persons of unsound mind, drunken persons, married

(*a*) *Ante*, p. 75.
(*b*) *Ante*, pp. 2, 7. 65 *sq.*, 81.
(*c*) *Ante*, pp. 68, 221.
(*d*) By stat. 33 Vict. c. 14, s. 2.
(*e*) Co. Litt. 2, 3. 42 b; *ante*, pp. 73—75, 81. 106. 116.

women, and convicts. Corporations may purchase lands (*f*); but their capacity for holding or disposing of them is restricted by laws, which have no application to natural persons.

Infants.

All persons under the age of twenty-one years are infants in law (*g*). The purchase of land by an infant is voidable at his option; that is, he may disagree thereto within a reasonable time after coming of age, and so may his heir, if he die while the purchase is still voidable; but it remains good until set aside (*h*). And the conveyance of land by an infant is, as a rule, similarly voidable (*i*). But, as we have seen, an infant under the custom of gavelkind may make a valid conveyance by feoffment (*k*). And by an Act of 1855 (*l*), every infant not under twenty if a male, and not under seventeen if a female, is empowered to make, in contemplation of marriage, a valid and binding settlement of any property, whether real or personal, with the sanction of the Chancery Division of the High Court. There are also other cases in which infants are specially empowered by statute to convey land, though for the benefit of others rather than of themselves (*m*). An infant's capacity to contract with regard to land is determined by the general rule of common law that infants' contracts are voidable at their option (*n*).

Infants' guardians.

During an infant's minority his guardian in socage (*o*) or by statute is entitled to the custody of his estate, to

(*f*) Co. Litt. 2 b.

(*g*) Litt. s. 259; Co. Litt. 2 b, 78 b, 171 b.

(*h*) Co. Litt. 2 b; *Birkenhead, &c., Railway Co.* v. *Pilcher*, 5 Ex. 123—128; 1 Dart, V. & P. 29, 30, 6th ed.

(*i*) 2 Black. Comm. 291; Bac. Abr. Infancy and Age (I. 3); *Zouch* v. *Parsons*, 3 Burr. 1794; *Allen* v. *Allen*, 2 Dru. & War. 307, 338, 346.

(*k*) *Ante*, pp. 59, 210.

(*l*) Stat. 18 & 19 Vict. c. 43, extended to the Court of Chancery in Ireland by stat. 23 & 24 Vict. c. 83; *Re Dalton*, 6 De G. M. & G. 201.

(*m*) See 1 Dart, V. & P. 3, 347, n. (*k*), 6th ed.; stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 31.

(*n*) See Pollock on Contracts, ch. ii., pp. 52 *sq.*, 6th ed.

(*o*) *Ante*, p. 51.

be used for his benefit (*p*). Guardians by statute are so called because their authority was established by the Statute of Charles II. abolishing military tenures (*q*). For when this Act took away the right of wardship of infant tenants from the lords (*r*), it gave to the father the right of appointing guardians, by deed or will, to any child of his, who should be under age and unmarried at his death (*s*). The guardian so appointed has the custody and tuition of the child, while remaining under the age of twenty-one years, or for any shorter time appointed; he also has a right to receive the rents of the child's lands for the use of the child, to whom, like a guardian in socage, he is accountable when the child comes of age (*t*). And now, by the Guardianship of Infants Act, 1886 (*u*), on the death of the father of an infant, the mother shall be the guardian, either alone or jointly with any guardian appointed by the father or the Court. The mother of an infant is, by the same Act, empowered (*x*) by deed or will to appoint guardians to act after her own and the father's death; and where guardians are appointed by both parents they shall act jointly. Every guardian under this Act has the same

(*p*) Bac. Abr. Guardian (A). As to the duties and powers of guardians, see Simpson on Infants.

(*q*) *Ante*, p. 54.

(*r*) *Ante*, pp. 47, 54.

(*s*) Stat. 12 Car. II. c. 24, s. 8: see *Morgan* v. *Hatchell*, 19 Beav. 86. This power was given whether the father were under or over the age of twenty-one. But it seems that the father, if under age, cannot now appoint a guardian by *will*; for the Wills Act enacts that no will made by any person under the age of twenty-one years shall be valid; stat. 7 Will. IV. & 1 Vict. c. 26, s. 7: 1 Jarm. Wills, 34, 5th ed.

(*t*) Stat. 12 Car. II. c. 24, ss. 8, 9; *Mathew* v. *Brise*, 14 Beav. 341. If an infant be entitled to the possession of land under an instrument coming into operation after the year 1881, the Conveyancing Act, 1881, stat. 44 & 45 Vict. c. 41, s. 42, gives powers of entry upon and management of the infant's land during minority to the trustees appointed for this purpose in such instrument, or by the Court on the application of the infant's guardian or next friend.

(*u*) Stat. 49 & 50 Vict. c. 27, s. 1; *Re X.*, 1899, 1 Ch. 526.

(*x*) Sect. 3; see *Re G.* (*an infant*), 1892, 1 Ch. 292. A guardian could not previously be appointed by any one but the father; *Ex parte Edwards*, 3 Atk. 519; Bac. Abr. Guardian (A. 3). See also Hargrave's notes to Co. Litt. 88 b.

powers over the estate and person of an infant as any guardian appointed under Statute 12 Car. II. c. 24 (*y*). Where not ousted by the effect of these enactments, the old law of wardship in socage still remains (*z*). Under the general jurisdiction of the Court of Chancery (*a*), now exerciseable in the Chancery Division of the High Court (*b*), guardians both of the person and of the estate of an infant may be appointed by the Court, and the action of testamentary and other guardians controlled (*c*). By the Settled Land Act, 1882 (*d*), the powers of leasing and sale and the other powers given to a tenant for life by that Act may be exercised on behalf of an infant, in respect of any land to which he is in his own right entitled in possession, by the trustees of the settlement, if any, or such other person as the Court may order.

Persons of unsound mind and drunken persons.

As to the capacity of persons of unsound mind and drunken persons, the present law is this:—The contract of a man who is so insane or drunk as to be incapable of understanding its effect, is voidable at his option, if the other party knew of his condition. But if the other contracted with him in good faith, and without knowledge of or reasonable cause to suspect his state of mind, and the contract be partly executed, he cannot avoid it (*e*). The voluntary conveyance of land by a person of unsound mind appears to be absolutely void (*f*). But a conveyance made by a person

(*y*) Sect. 4; *Re Scanlan*, 40 Ch. D. 200.

(*z*) 2 Black. Comm. 87; Chambers on Infancy, 52—63, 509—514; Simpson on Infants, 208, 2nd ed.

(*a*) See Co. Litt. 88 b. n. (15); 2 Fonbl. Eq. 226. note; 1 Spence, Eq. Jur. Ch. XIV.

(*b*) Stat. 36 & 37 Vict. c. 66, ss. 16, 34; *ante*, p. 164.

(*c*) See notes to *Eyre* v. *Countess of Shaftesbury*, 2 Tudor L. C. Eq. 718. 6th ed.: 2 Seton on Decrees, 837—848. 5th ed.; Dan. Ch. Practice. 1113—1122, 6th ed.

(*d*) Stat. 45 & 46 Vict. c. 38, ss. 59, 60; see also stat. 44 & 45 Vict. c. 41, s. 41; Wms. Conv. Stat. 200.

(*e*) *Molton* v. *Camroux*, 2 Ex. 487, 4 Ex. 17; *Beavan* v. *McDonnell*, 9 Ex. 309; *Matthews* v. *Baxter*, L. R. 8 Ex. 132; *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599: Pollock on Contracts, Ch. II. 86 *sq.*, 6th ed.

(*f*) *Elliot* v. *Ince*, 7 De G. M. & G. 475: Sug. Pow. 604. But

of unsound mind for a valuable consideration appears to be voidable only on his part, if the other party knew of his mental condition; and to be valid, if the transaction were carried out by the other party in good faith and without knowledge of the insanity (*g*). The law appears to be the same of a drunken person's conveyance of land for value: but it is questionable whether a voluntary conveyance made by a drunken man is void; for it seems that he might confirm it when sober (*h*). With regard to idiots and lunatics, the fullest powers of directing the management and administration of their property are by the Lunacy Act, 1890 (*i*), given to the Judge in Lunacy; and the *committees* of their estates, who are the persons to whom the care of their estates is committed, or such other persons as the judge shall approve, are empowered to execute and do all such assurances and things as may be directed in order to give effect to such powers (*k*). If a lunatic make a voidable contract or conveyance, it may be set aside by his committee, or by himself, if he should recover his senses, or if not, by his representatives after his death (*l*).

Committees.

Married women.

Married women are now capable of disposing of any real or personal property, which is their separate property, in the same manner as single women: except that they may be subject in equity to a restraint on alienation during marriage (*m*). But wives married

before 1845 a feoffment with livery of seisin made by a lunatic was not void, but voidable; Bac. Abr. Idiots and Lunatics (F.); stat. 8 & 9 Vict. c. 106, s. 4; *ante*, p. 147.

(*g*) *Price* v. *Berrington*, 3 Mac. & G. 486, 495—498; *Elliot* v. *Ince*, 7 De G. M. & G. 475, 487, 488; Sug. Pow. 605.

(*h*) See *Molton* v. *Camroux*, 4 Ex. 17, 19; *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

(*i*) Stat. 53 Vict. c. 5, ss. 108, 116 *sq.* These matters were previously regulated by stat. 16 & 17 Vict. c. 70, s. 108 *sq.*, amended by stat. 18 & 19 Vict. c. 13; and 25 & 26 Vict. c. 86; and before that by stat. 11 Geo. IV. & 1 Will. IV. c. 65.

(*k*) Stat. 53 Vict. c. 5, s. 124; *Re Ray*, 1896, 1 Ch. 468.

(*l*) See 2 Black. Comm. 291; 1 Dart, V. & P. 6, 31, 32, 6th ed.

(*m*) Stat. 45 & 46 Vict. c. 75,

before the year 1883 cannot so dispose of any property, to which their title accrued before that year (*u*); such property can only be disposed of by them in accordance with the earlier law, which will be explained in the next chapter. Married women may now bind themselves by contract in respect and to the extent of their separate property, to which they are entitled without restraint on anticipation: but not otherwise (*o*). At common law, their contracts were, as a rule, void (*p*).

Convicts.

By the Act of 1870 abolishing attainder (*q*), convicts, or persons against whom judgment of death or penal servitude has since the Act been pronounced or recorded for treason or felony, are incapable, while subject to the operation of the Act, of alienating or charging any property, or of making any contract. And an administrator of any convict's property may be appointed, in whom all his real and personal property shall vest, to re-vest in the convict or his representatives, on his death, bankruptcy, completion of his term of punishment, or pardon (*r*). But these disabilities on the part of a convict are suspended while he is lawfully at large under any licence (*s*).

Attainted persons.

Before the abolition of attainder for treason or felony, persons attainted for these crimes could not, by any conveyance which they might make, defeat the right to their estates, which their attainder gave to the Crown, or to the lord, of whom their estates were holden (*t*). Though outlawry is no longer any

ss. 1 (sub-s. 1), 19; *Re Price*, 28 Ch. D. 709; *Re Drummond & Davies' Contract*, 1891, 1 Ch. 524; see *ante*, p. 83, and next chapter.

(*u*) See sect. 5; *Reid* v. *Reid*, 31 Ch. D. 402; *Re Cuno*, 43 Ch. D. 12.

(*o*) Stat. 45 & 46 Vict. c. 75, s. 1, sub-s. 2, amended by 56 & 57 Vict. c. 63, s. 1; *Scott* v. *Morley*, 20 Q. B. D. 120; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422.

(*p*) See Wms. Conv. Stat. 393—396.

(*q*) Stat. 33 & 34 Vict. c. 23, ss. 6, 8; *ante*, p. 55.

(*r*) Sects. 7, 9, 10, 18. Property vested in a convict on any trust or by way of mortgage is excepted; stat. 56 & 57 Vict. c. 53, s. 48.

(*s*) Stat. 33 & 34 Vict. c. 23, s. 30.

(*t*) Co. Litt. 42 b; 2 Black. Comm. 290; Perkins, tit. Grant,

cause of escheat (*a*), an outlaw still forfeits the profits of his real estate while he lives (*x*).

Aliens.

By the common law, *aliens*, or foreigners under no allegiance to the Crown (*y*), might *purchase*, but were incapable of inheriting or holding any estates in lands. And the conveyance of lands to an alien was in general (*z*) a cause of forfeiture to the Crown, which might seize the lands by virtue of its prerogative (*a*). And if lands were

sect. 26; Com. Dig. Capacity (D.) 6; 2 Shep. Touch. 232: *Doe* d. *Griffith* v. *Pritchard*, 5 B. & Ad. 765.

(*a*) *Ante*, pp. 48, 55.

(*x*) Bac. Abr. Outlawry (D.); Short and Mellor's Crown Office Practice, 385; see Wms. Pers. Prop. 94, 154, 15th ed.

(*y*) Litt. s. 198. No person is considered an alien who is born within the dominions of the Crown, even though such person may be the child of an alien, unless such alien should be the subject of a hostile prince: 1 Black. Comm. 373: Bac. Abr. Aliens (A.). And a person born in Scotland after the accession of James I. to the Crown of England, was held to be a natural-born subject, and consequently entitled to hold lands in England, although the two kingdoms had not then been united: *Calvin's case*, 7 Rep. 1; see *Re Stepney Election Petition*, 17 Q. B. D. 54. Again, the children of the Queen's Ambassadors are natural-born subjects by the common law; 7 Rep. 18 a. And by several Acts of Parliaments, the privileges of natural-born subjects were accorded to the lawful children, though born abroad, of a natural-born father, and also to the grandchildren on the father's side of a natural-born subject; stats. 25 Edw. III. st. 2; 7 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21; *Doe* d. *Durouré* v. *Jones*, 4 T. R. 300; *Sheddon* v. *Patrick*, 1 Macqueen's H. L. C. 535; *Fitch* v. *Weber*, 6 Hare, 51; *Re Willoughby*, 30 Ch. D. 324; see *De Geer* v. *Stone*, 22 Ch. D. 243. More recently, the children of a natural-born mother, though born abroad, were rendered capable of taking any real or personal estate; and it was provided that any woman, who should be married to a natural-born subject or person naturalized, should be taken to be herself naturalized, and have all the rights and privileges of a natural-born subject; stat. 7 & 8 Vict. c. 66, ss. 3, 16. Any foreigner might be made a denizen by royal letters patent, and capable as such of holding but not of inheriting lands, or might be naturalized by Act of Parliament; Co. Litt. 2 b. 129 a; 1 Black. Comm. 373. The law relating to aliens was generally amended by the Naturalization Act, 1870, stat. 33 Vict. c. 14, by which many of the former statutes on this subject were repealed.

Denizen.

(*z*) The common law allowed an exception in the case of a house occupied under a lease for years by a friendly alien merchant; Co. Litt. 2 b. And by stat. 7 & 8 Vict. c. 66, s. 5, a resident alien, the subject of a friendly state, might hold lands for any term not exceeding twenty-one years for the purposes of residence or business.

(*a*) But not, at common law,

purchased by a natural-born subject in trust for an alien, the Crown might claim the benefit of the purchase (*b*). But now by the Naturalization Act, 1870 (*c*), real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien (*d*) in the same manner in all respects as through, from or in succession to a natural-born British subject.

Corporations. Corporations, as conceived by the common law, were under no incapacity to hold or dispose of lands. A corporation, it may be explained, is a fictitious body invested by law with the attributes of a person, having a corporate name by which it can sue and be sued and hold property, but enjoying immortal existence by reason of the perpetual succession of its members (*e*); as the Corporation of London, or Trinity College,

until after office found; that is, after an inquest of office, or official inquisition held to ascertain the facts of the case, had found a verdict; Co. Litt. 2 b, 42 b; Black. Comm. i. 371, 372; ii. 249, 274, 293; iii. 258. Conveyance of the lands by the alien to a natural-born subject before office found would not avail to defeat the liability to forfeiture, though in other respects it was valid: Shep. Touch. 232; 4 Leon. 84; *Fish* v. *Klein*, 2 Mer. 431. Stat. 22 & 23 Vict. c. 21. s. 25, abolished the necessity of an inquest of office.

(*b*) *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St. Saureur*, L. R. 7 Ch. 343; overruling *Rittson* v. *Stordy*, 3 Sm. & G. 230. But if lands were directed to be sold, and the produce given to an alien, the Crown had then no claim; *Du Hourmelin* v. *Sheldon*, 1 Beav. 79, 4 My. & Cr. 525.

(*c*) Stat. 33 Vict. c. 14, s. 2, passed 12th May, 1870, and amended by stats. 33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39; and 58 & 59 Vict. c. 43. This Act is not retrospective: *Sharp* v. *St. Saureur*, L. R. 7 Ch. 343.

(*d*) All the King's natural-born subjects were enabled to trace their title by descent through their alien ancestors by stat. 11 & 12 Will. III. c. 6, explained by 25 Geo. II. c. 39.

(*e*) 10 Rep. 30 b; 1 Black. Comm. 467, 475; *Mayor & Commonalty of Colchester* v. *Lowten*, 1 V. & B. 226, 244—246, 12 R. R. 216; Blackburn, J., *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 224, 263; see Grant on Corporations, 129.

Cambridge. But by the effect of the statutes prohibiting the alienation of lands into mortmain (*f*), corporations are generally disabled from holding lands without a licence from the Crown to hold lands in mortmain, or the authority of an Act of Parliament (*g*). The corporations, which are empowered by statute to hold land without a licence in mortmain, are too numerous to be particularly specified here (*h*). For example, every joint stock company incorporated under the Companies Act, 1862 (*i*), has power to hold lands: but no company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or the members thereof, may hold more than two acres of land without the sanction of the Board of Trade (*k*).

Alienation of corporation lands.

Whether any particular corporation can freely exercise its capacity for alienating its lands depends generally on the purposes of its existence. Corporations existing for public or charitable purposes have been in many instances placed under statutory restraints in the way of the disposal of their lands. Thus ecclesiastical corporations and colleges were restrained by statutes of Elizabeth and James I. from alienating their lands for more than twenty-one years or three lives; and sales and leases of the lands of such bodies are now regulated by numerous statutes (*l*). Municipal corporations subject to the provisions of the Municipal Corporations Act, 1882, may not alienate corporate land (except by leasing to a limited extent) without the approval of the Local Government Board (*m*). The alienation of land held for

Ecclesiastical corporations.

Municipal corporations.

Alienation of charity lands.

(*f*) Stats. 7 Edw. I. st. 2; 7 & 8 Will. III. c. 37: now repealed and replaced by stat. 51 & 52 Vict. c. 42, s. 1: *ante*, pp. 53, 75.

(*g*) Britton, liv. 2, ch. 3, s. 11; Co. Litt. 2 b, 99 a; Black. Comm. i. 479, ii. 268 *sq.*; Shelford on Mortmain, 5, 35 *sq.*

(*h*) See Index to Statutes, Mortmain, 2, 3.

(*i*) Stat. 25 & 26 Vict. c. 89, s. 18.

(*k*) Sect. 21.

(*l*) See Co. Litt. 43 a, 44 a; Index to Statutes, Colleges (2), Corporation (2), Ecclesiastical Commission (3), Lease (3).

(*m*) Stat. 45 & 46 Vict. c. 50, ss. 6, 108, amended by 51 & 52 Vict. c. 41, s. 72; replacing 5 &

charitable purposes, whether by corporations or other trustees, was subject to the control of the Court of Chancery (*n*) and is now placed under statutory restriction (*o*). And the alienation of Crown lands has long been regulated by Parliament (*p*). It is held, moreover, that corporations created by statute for special purposes, as a Railway Company, are prohibited from dealing with their corporate property in a manner which is extraneous to the purposes for which they were created (*q*). The capacity of a corporation to contract with regard to land is commensurate with its power of disposing of land (*q*). Here it may be mentioned that it was held under the old law of uses (*r*), that a corporation, having no conscience, could not stand seised of land to others' use (*s*). It follows that on a grant of lands to a corporation to the use of another person, the legal estate remains in the corporation and is not transferred to the other by the effect of the Statute of Uses (*t*). But as a trust may be enforced against a corporation under modern equity (*u*), the corporation would stand seised of the legal estate on trust for the other person. Formerly, if a gift of lands

Corporation cannot stand seised to others' use.

6 Will. IV. c. 76. ss. 94, 96; 6 & 7 Will. IV. c. 104, s. 2. See *Davis* v. *Corporation of Leicester*, 1894, 2 Ch. 208.

(*n*) 2 Maddock's Chancery Practice, 95, 3rd ed.; 1 Dart, V. & P. 19, 6th ed.

(*o*) Stat. 18 & 19 Vict. c. 124, s. 29. The alienation and conveyance of charity lands are now regulated by stats. 16 & 17 Vict. c. 137 (ss. 21, 24, 26, 62 especially); 18 & 19 Vict. c. 124 (ss. 16, 29, 30, 35, 36, 37 especially); 23 & 24 Vict. c. 136, s. 15; 32 & 33 Vict. c. 110, s. 12; see *Governors of the Charity for Relief of Poor Widows and Children of Clergymen* v. *Sutton*, 27 Beav. 651; *Royal Society of London and Thompson*, 17 Ch. D. 407; *Finnis & Young to Forbes & Pochin* (No. 2), 24 Ch. D. 591; *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145; *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596.

(*p*) *Ante*, p. 56, n. (*l*).

(*q*) *Mulliner* v. *Midland Railway Co.*, 11 Ch. D. 611; *Re Metropolitan District Railway Co. & Cosh*, 13 Ch. D. 607; Pollock on Contracts, 107 *sq.* and note D., 6th ed.

(*r*) *Ante*, p. 168.

(*s*) 1 Rep. 122 a; 1 Sand. Uses, 59. For this reason, it was the practice, down to 1845, for a corporation to convey by feoffment, and not by lease and release: 1 Dart, V. & P. 600, 6th ed.

(*t*) *Ante*, pp. 171—173; Sugd. n. to Gilb. Uses, 7, 8, 3rd ed.

(*u*) Lewin on Trusts, 30, 6th and 10th ed.; *ante*, pp. 173 *sq.*

Gift to a corporation and another as joint tenants.

were made to a corporation and another person in such terms as would have made them joint tenants, had they both been natural persons, they took as tenants in common; for it was considered to be inconsistent with the nature of a corporation to take an interest otherwise than for its own proper corporate use exclusively (*r*). But by an Act of 1899 (*s*) corporations were made capable of acquiring and holding any real or personal property in joint tenancy with others; and a gift of any property to a corporation and another jointly will now make them joint tenants.

(*r*) Co. Litt. 189 b, 190 a; Bac. Abr. Joint Tenants (B).

(*s*) Stat. 62 & 63 Vict. c. 20.

CHAPTER XIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

THE next subject of our attention will be the mutual rights in respect of lands, arising from the relation of husband and wife. In pursuing this subject, let us consider, first, the rights of the husband in respect of the lands of his wife; and, secondly, the rights of the wife in respect of the lands of her husband.

The rights of the husband in respect of the lands of his wife.

1. First, then, as to the rights of the husband in respect of the lands of his wife. Since the commencement of the year 1883, the legal capacity of wives, with regard to property, has been completely changed by the operation of the Married Women's Property Act, 1882 (*a*). But wives, who were married before the year 1883, still remain subject to the previous law, with respect to property to which their title accrued before that year (*b*). And without some knowledge of the old law, it would be impossible to understand the Act in question. We shall therefore first inquire into the position of wives with regard to property at common law, then examine the privileges which might be secured to them under the rules of equity, and lastly consider the rights now conferred on them by statute.

The common law as to husband and wife.

At common law, by the act of marriage, the husband and wife became in law one person, and so continued during the coverture or marriage (*c*). The wife was, as

(*a*) Stat. 45 & 46 Vict. c. 75.
(*b*) Sect. 5; *Re Harris's Settled Estates*, 28 Ch. D. 171; *ante*, p. 293.
(*c*) Litt. s. 168; 1 Black. Comm. 442; Gilb. Ten. 108; 1 Rop. Husb. & Wife, 1. As to the early law, see P. & M. Hist. Eng. Law, i. 465, ii. 397 *sq.*, 435.

it were, merged in her husband. Immediately upon marriage, therefore, the husband became entitled to the whole of the rents and profits which might arise from his wife's lands, and acquired a freehold estate therein, during the continuance of the coverture (*d*); and, in like manner, all the goods and personal chattels of the wife, the property in which passed by mere delivery of possession, at once belonged solely to her husband (*e*). For by the ancient common law, it was impossible that the wife should have any power of disposition over property for her separate benefit, independently of her husband. The husband also acquired by marriage a seisin (*f*) of all his wife's freeholds, jointly with her (*g*).

Curtesy.

If, however, the husband had issue by his wife born alive, that might by possibility inherit the estate as her heir, he became entitled to an estate, after the wife's death, for the residue of his own life in such lands and tenements of his wife as she was solely seised of in fee simple, or fee tail in possession (*h*). The husband, while in the enjoyment of this estate, was called a tenant by the *curtesy* of England, or more shortly, tenant by the curtesy. But the estate must have been a several one, or else held under a tenancy in common, and must not have been one of which the wife was seised jointly, with any other person or persons (*i*). The estate must also have been an estate in possession; for there could be no curtesy of an estate in reversion expectant on a life interest or other estate of freehold (*k*).

Estate must not be joint.

Estate must be in possession.

(*d*) 1 Rop. Husb. & Wife, 3; *Robertson* v. *Norris*, 11 Q. B. 916.

(*e*) 1 Rop. Husb. & Wife, 169; see Wms. Pers. Prop. 467—470, 15th ed.

(*f*) *Ante*, p. 36.

(*g*) Co. Litt. 273 b, 325 b. 351 a; *Robertson* v. *Norris*, 11 Q. B. 916. Of the wife's freehold estates of inheritance the husband and wife were said to be seised in fee in right of the wife; *Polyblank* v. *Hawkins*, 1 Doug. 329; 1 Wms. Saund. 253, n.

(*h*) Litt. ss. 35. 52, 90; Co. Litt. 29, 30; 2 Black. Comm. 126; 1 Rop. Husb. & Wife, 5; *Barker* v. *Barker*, 2 Sim. 249.

(*i*) Co. Litt. 183 a; 1 Rop. Husb. & Wife. 12; *Palmer* v. *Rich*, 1897, 1 Ch. 134, 141.

(*k*) 2 Black. Comm. 127; Watk. Desc. 111 (121, 4th ed.).

The husband must also have had, by his wife, issue born alive; except in the case of gavelkind lands, where the husband had a right to his curtesy, whether he had had issue or not: but, by the custom of gavelkind, curtesy extends only to a moiety of the wife's lands, and ceases if the husband marries again (*l*). The issue must also have been capable of inheriting as heir to the wife (*m*). Thus, if the wife were seised of lands in tail male, the birth of a daughter only would not entitle her husband to be tenant by curtesy; for the daughter could not by possibility inherit such an estate from her mother. And it was necessary that the wife should have acquired an actual seisin of all estates, of which it was possible that an actual seisin could be obtained; for the husband had it in his own power to obtain for his wife an actual seisin; and it was his own fault if he had not done so (*n*).

Issue must have been born alive except as to gavelkind lands.

Issue must have been capable of inheriting as heir to the wife.

The wife must have been actually seised

The husband could dispose of the estate which he took during coverture or by the curtesy in lands belonging to his wife at common law, without her concurrence (*o*): and it was subject to his debts in his lifetime either upon execution of a judgment against him (*p*), or on his bankruptcy (*q*). But he could make no lawful disposition of her freehold estates to endure beyond his own interest. So that, if his wife survived him, she resumed her right to her freehold estates,

Husband's powers of disposition of his wife's freeholds.

(*l*) Co. Litt. 30 a. n. (1): Bac. Abr. Gavelkind (A.): Rob. Gav. bk. ii. c. 1.

(*m*) Litt. s. 52; 8 Rep. 34 b.

(*n*) 2 Black. Comm. 131; *Parker* v. *Carter*, 4 Hare, 416. In the first edition of this work a doubt was thrown out whether, under the new law of inheritance, a husband can ever become tenant by the curtesy to any estate which his wife has inherited. The reasons which afterwards induced the author to incline to the contrary opinion will be found in Appx. (C). See *Eager* v. *Furnivall*, 17 Ch. D. 115.

(*o*) Co. Litt. 30 a: *Robertson* v. *Norris*, 11 Q. B. 916.

(*p*) Note (1) to *Underhill* v. *Devereux*, 2 Wms. Saund. 690, 6th ed.; stat. 1 & 2 Vict. c. 110, s. 11; *ante*, pp. 262 *sq.*

(*q*) Com. Dig. Bankrupt, D. (11); *ante*, p. 271.

which could not be defeated by his debts or alienations (*r*). And if he survived her, her estates in fee simple or tail descended to her heir, if she were the purchaser, or to the heir of the purchaser, if she had become entitled by descent, subject only to the husband's estate by the curtesy, if he had become entitled thereto (*s*). For the incapacity, under which a married woman laboured at common law, not only hindered her from making any separate disposition of her lands in her lifetime, but also prevented her from devising them by her will. By the Settled Estates Act, 1877 (*t*), a husband entitled to land as tenant by the curtesy, or in right of a wife who is seised in fee, has the same power of leasing as is thereby given to a tenant for life. And by the Settled Land Act, 1882 (*u*), a tenant by the curtesy has the powers of leasing and sale, and the other powers given to a tenant for life by that Act.

Husband's powers of leasing, &c.

Power of disposition of husband and wife together.

But although the husband alone could not lawfully alienate his wife's freeholds for a greater estate than his own, and the wife alone had no disposing power at all, by the common law the husband and wife *together* might make any such dispositions of the wife's interest in real estate as she could make if unmarried. The

(*r*) Litt. ss. 594, 598—600, 605; Co. Litt. 326 a; *Robertson* v. *Norris*, 11 Q. B. 916; 1 Rop. Husb. & Wife. 55 *sq.*, 137.

(*s*) By stat. 6 Anne, c. 18. s. 5, every husband seised in right of his wife only, who continues in possession after the determination of his estate, without the consent of the persons next entitled, shall be adjudged to be a trespasser: and the full value of the profits received during such wrongful possession may be recovered in damages against him or his executors or his administrators.

(*t*) Stat. 40 & 41 Vict. c. 18, s. 46; see *ante*, p. 118, n. (*m*). This Act replaced stat. 19 & 20 Vict. c. 120, which repealed stat. 32 Hen. VIII. c. 28, enabling husbands seised in right of or jointly with their wives to make leases, with their wives' concurrence, of such of the lands as had been most commonly let to farm for twenty years before, for any term not exceeding twenty-one years or three lives, under the same restrictions as tenants in tail were by the same Act empowered to lease.

(*u*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (viii.); 47 & 48 Vict. c. 18, s. 8; *ante*, pp. 118—124.

mode in which such dispositions were formerly effected was by a *fine* duly levied in the Court of Common Pleas. We have already had occasion to advert to fines, in respect to their former operation on estates tail (*x*). They were, as we have seen, fictitious suits commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. Whenever a married woman was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free will, or was compelled to it by the threats and menaces of her husband (*y*). Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's as of the husband's interest of every kind, in the land comprised in the fine. The cumbrous and expensive nature of fines having occasioned their abolition, provision was made by the Fines and Recoveries Act, 1833 (*z*), for the conveyance by deed merely of the interests of married women in real estate. By this Act every kind of conveyance or disclaimer of freehold estates which a woman could execute if unmarried, might be made by her by a deed executed with her husband's concurrence (*a*); but the separate examination, which was before necessary in the case of a fine, was still retained; and every deed executed under the provisions of the Act, was required to be produced and *acknowledged* by the wife as her own act and deed, before a judge of one of the superior Courts at Westminster, or of any County Court, or a master in Chancery, or two commissioners (*b*), who were required, before they received the acknowledgment, to examine her apart from her husband touching

Fine.

Conveyance by married women under stat. 3 & 4 Will. IV. c. 74.

The wife must have acknowledged the deed.

(*x*) *Ante*, p. 98.

(*y*) Cruise on Fines, 108, 109; P. & M. Hist. Eng. Law, ii. 409, 410.

(*z*) Stat. 3 & 4 Will. IV. c. 74; *ante*, p. 99. See stat. 4 & 5 Will. IV. c. 92, as to Ireland.

(*a*) Sect. 77; stat. 8 & 9 Vict. c. 106, s. 7.

(*b*) Stats. 3 & 4 Will. IV. c. 74, s. 79; 51 & 52 Vict. c. 43, s. 184, replacing 19 & 20 Vict. c. 108, s. 73.

her knowledge of the deed, and to ascertain whether she freely and voluntarily consented thereto (*c*). Deeds executed by married women after the year 1882 may be acknowledged before one commissioner only (*d*). But without a fine at common law, or a deed acknowledged under the Act of 1833, no conveyance could formerly be made of any married woman's estate in lands at law (*e*). And this is still the law with regard to those lands of wives married before the year 1883, to which their title accrued before that year.

Husband and wife considered as one person.

Gift to husband and wife and a third person.

The rule of law, by which husband and wife were considered as one person, was occasionally productive of rather curious consequences. Thus, if lands were given to A. and B. (husband and wife), and C., a third person, and their heirs—here, had A. and B. been distinct persons, each of the three joint tenants would, as we have seen (*f*), have been entitled, as between themselves, to one-third part of the rents and profits, and would have had a power of disposition also over one-third part of the whole inheritance. But, since A. and B., being husband and wife, were only one person, they took, under such a gift, a moiety only of the rents and profits, with a power to dispose only of one-half of the inheritance (*g*); and

(*c*) Stat. 3 & 4 Will. IV. c. 74. s. 80); *Tennent* v. *Welch*. 37 Ch. D. 622. This Act also required a certificate of the taking of the acknowledgment to be duly signed and filed, otherwise the acknowledgment was of no effect: sects. 84—86; *Jolly* v. *Handcock*, 7 Ex. 820. But a certificate of the acknowledgment of deeds executed after the year 1882 is not required: stat. 45 & 46 Viet. c. 39. s. 7. The last mentioned enactment (in this respect replacing stats. 17 & 18 Viet. c. 75, & 41 & 42 Viet. c. 23) also removes doubts, which might arise in consequence of any person taking the acknowledgment being an interested party.

(*d*) Stat. 45 & 46 Viet. c. 39, s. 7.

(*e*) *Cahill* v. *Cahill*, 8 App. Cas. 420. But there might be given to a married woman a *power of appointment* enabling her to dispose of an estate in land as effectually as a single woman. See *post*. Part II., Ch. III.

(*f*) *Ante*, pp. 134, 136.

(*g*) Litt. s. 291; *Gordon* v. *Whieldon*, 11 Beav. 170; *Re Wylde*, 2 De G. M. & G. 724. The rule is also applied to gifts to husband and wife and others as tenants in common: but it may be excluded by the words of the gift or the context; see *Re Dixon*, 42 Ch. D. 306.

C., the third person, took the other half, as joint tenant with them. Again, if lands were given to A. and B. (husband and wife) and their heirs—here, had they been separate persons, they would have become, under the gift, joint tenants in fee simple, and each would have been enabled without the consent of the other, to dispose of an undivided moiety of the inheritance. But as A. and B. were one, they took, as it was said, *by entireties*; and, whilst the husband might do what he pleased with the rents and profits during the coverture, he could not dispose of any part of the inheritance, without his wife's concurrence. Unless they both agreed in making a disposition, each one of them had to run the risk of gaining the whole by survivorship, or losing it by dying first (*h*). Another consequence of the unity of husband and wife was the inability of either of them to convey to the other. As a man could not convey to himself, so he could not convey to his wife, who was regarded as part of himself (*i*). But by means of the Statute of Uses the effect of a conveyance by a man to his wife could be produced (*k*); for a man might and still may convey to another person to the use of his wife in the same manner as, under the statute, a man may convey to the use of himself (*l*). And by the Conveyancing Act of 1881, in conveyances made after the year 1881, freehold land may be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*m*). A man has always been able to leave lands to his wife by his will; for the married state does not deprive the husband of that disposing power which he would possess if single (*n*), and a devise by will does not take effect until after his decease (*o*).

Gift to husband and wife and their heirs.

They took by entireties.

Husband and wife could not convey to each other.

(*h*) *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652; *Thornley* v. *Thornley*, 1893, 2 Ch. 229.

(*i*) Litt. s. 168; see Wms. Conv. Stat. 391, 392.

(*k*) 1 Rop. Husb. & Wife, 53.

(*l*) *Ante*, p. 205.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 50; see Wms. Conv. Stat. 223, 224, 391, 392.

(*n*) See Wms. Pers. Prop. 468, 15th ed.

(*o*) Litt. s. 168.

Rules of equity as to wives' property.

Next, as to the rights of married women under the rules of equity. If lands were held on trust for a wife for life or in fee simple or tail, but without any provision for her separate benefit, the husband was entitled to receive the rents and profits, and acquired an equitable estate therein during the continuance of the coverture (*p*). It appears, however, that in such a case the wife might, under certain circumstances, acquire a right in equity to have a provision for her maintenance secured to her by settlement of the rents and profits, or part thereof, in trust for that purpose (*q*). Equity also followed the law in giving to the husband the right to enjoy his wife's equitable estate of inheritance after her death for the rest of his own life, as tenant by the curtesy in equity, under circumstances similar to those which gave rise to a tenancy by the curtesy at law (*r*). The wife's equitable estates might be disposed of by the husband and wife together, by the same means as they might use to convey her legal estates, but not otherwise (*s*).

Wife's equity to a settlement.

Curtesy of equitable estate.

Trusts for separate use enforced.

In modern times, however, if property of any kind were vested in trustees, in trust to apply the income *for the separate use* of a woman during any coverture, present or future, the trust for the separate use of the

(*p*) Lewin on Trusts, 618—620, 6th ed.; 913—915, 10th ed.

(*q*) If the husband became bankrupt, and the wife had no means of support, she might obtain such a settlement as against his assignee or trustee in bankruptcy. But she could not obtain such a settlement as against her husband, so long as he supported her; or against his assignee for valuable consideration, though her husband should, subsequently to the assignment, have ceased to support her. See *Sturgis* v. *Champneys*, 5 My. & Cr. 97; *Tidd* v. *Lister*, 10 Hare, 140, 3 De G. M. & G. 857, 869, 870; *Durham* v. *Crackles*, 8 Jur., N. S., 1175; *Gleaves* v. *Paine*, 1 De G. J. & S. 93, 94; *Wortham* v. *Pemberton*, 1 De G. & Sm. 644, 661; *Smith* v. *Matthews*, 3 De G. F. & J. 139; *Barnes* v. *Robinson*, 1 N. R. 257; Sugd. V. & P. 560; Lewin on Trusts, *ubi sup.*; Williams on Settlements, 99, 100; see also *Fowke* v. *Draycott*, 29 Ch. D. 996.

(*r*) 1 Rop. Husb. & Wife, 18; Lewin on Trusts, 596, 606, 6th ed.; 886, 897, 10th ed.; *ante*, p. 300.

(*s*) *Taylor* v. *Meads*, 4 De G. J. & S. 604, 605; Lewin on Trusts, 618, 6th ed.; 913, 10th ed.; *ante*, p. 302.

wife might be enforced in equity (*t*). That is, the Courts of Equity obliged the trustees to hold for the sole benefit of the wife, and prevented the husband from interfering with her in the disposal of such income; she consequently enjoyed the same absolute power of disposition over it as if she were sole or unmarried. And, if the income of property were given directly to a woman, for her separate use, without the intervention of any trustee, the Court compelled her husband himself to hold his marital rights in such income simply as a trustee for his wife independently of himself (*u*). The limitation of property in trust for the separate use of an intended wife was one of the principal objects of a modern marriage settlement. By means of such a trust, a provision might be secured, which would be independent of the debts and liabilities of the husband, and thus free from the risk of loss, either by reason of his commercial embarrassments, or of his extravagant expenditure. In order more completely to protect the wife, the Court of Chancery allowed property thus settled for the separate use of a woman to be so tied down for her own personal benefit, that she should have no power, during her coverture, to anticipate or assign her income; for it is evident that, to place the wife's property beyond the power of her husband, is not a complete protection for her,—it must also be placed beyond the reach of his persuasion. In this particular instance, therefore, an exception has been allowed to the general rule, which forbids any restraint to be imposed on alienation. For, when the trust, under which property was held for the separate use of a woman during any coverture, declared that she should not dispose of the same or of the income thereof in any mode of anticipation, every attempted

Separate property may be rendered inalienable.

(*t*) As to the history of the introduction of this doctrine, see Haynes, Outlines of Equity, Lect. VII. pp. 217 *sq.*, 4th ed.

(*u*) 2 Rop. Husb. & Wife, 152. 182; *Major* v. *Lansley*, 2 Russ. & My. 355.

As to the *corpus*.

disposition by her during such coverture was deemed absolutely void (*x*). Not only the income, but also the *corpus* of any property, whether real or personal, might be limited to the separate use of a married woman. And in 1865 it was finally settled that a simple gift of real estate for a wife's separate use, either with or without the intervention of trustees (*y*), was sufficient to give her the power to dispose by her own act *inter vivos* or by will, without the consent or concurrence of her husband, of the whole equitable estate so limited to her (*z*). The same rule had long been established with respect to personal estate (*a*). And where lands were limited on trust for a wife in fee, for her separate use, she had the right of every *cestui que trust* in similar case (*b*), to require her trustees to convey the legal estate therein according to her direction (*c*). If the lands had been so given without the intervention of trustees, she must have conveyed the *legal* estate therein by deed acknowledged (*d*), in which she could then have compelled her husband to concur. For in the Courts of Equity, a married woman was as competent to act with respect to her separate estate as if she were single (*e*). And not only was a wife so enabled to alienate directly any part of her separate estate, but if she made any general pecuniary engagements with reference to her separate estate, her creditors, though they could have no remedy against her at law, might take proceedings in equity to have their claims satisfied out of any separate estate, to which she was entitled, without restraint on

Wife's general engagements.

(*x*) *Brandon* v. *Robinson*, 18 Ves. 434, 11 R. R. 226; 2 Rop. Husb. & Wife. 230; *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav. 34, 4 My. & Cr. 377; *Baggett* v. *Meux*, 1 Coll. 138, 1 Ph. 627; *Bateman* v. *Faber*, 1898, 1 Ch. 144; *ante*, p. 83.

(*y*) *Hall* v. *Waterhouse*, 5 Giff. 64.

(*z*) *Taylor* v. *Meads*, 4 De G. J. & S. 597.

(*a*) *Fettiplace* v. *Gorges*, 1 Ves. jun. 46, 1 R. R. 79.

(*b*) *Ante*, p. 178.

(*c*) 4 De G. J. & S. 604; L. R. 8 Eq. 142.

(*d*) *Ante*, p. 303.

(*e*) 1 Bro. C. C. 20; Lewin on Trusts, 624, 6th ed.; 926, 10th ed.

anticipation, at the time of entering into the engagement (*f*). If, however, a gift of real estate for the separate use of a wife had been accompanied with a restraint on anticipation of the income, she was prevented from disposing thereof during her coverture, except (in the case of an estate in fee simple) by will (*g*). Nor could she subject such real estate to her general engagements (*h*). But now, under the Conveyancing Act of 1881 (*i*), a married woman may, if it appears to the Court to be for her benefit, obtain an order of the Court enabling her to deal with any property of hers, notwithstanding that she be restrained from anticipation. It was finally settled, after conflicting decisions, that a husband should have curtesy of his wife's equitable estate in fee belonging to her for her separate use, if she died possessed thereof and intestate (*k*); but not if she had disposed thereof in her lifetime or by her will (*l*).

Curtesy of wife's separate equitable estate in fee.

Originally, a trust of property for the separate use of a wife could only arise by act of parties; as by antenuptial contract between husband and wife, or by the express provision of those by whom the property was bestowed (*m*). But the Married Women's Property Act, 1870 (*n*), provided that certain kinds of property should belong to wives for their separate use (*o*); amongst other things, the rents and profits of any freehold, copyhold or customaryhold property which should descend upon any

Married Women's Property Act, 1870.

(*f*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; Wms. Conv. Stat. 393, 394, and cases there cited.

(*g*) *Baggett* v. *Meux*, 1 Ph. 627; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*h*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 39.

(*k*) *Appleton* v. *Rowley*, L. R. 8 Eq. 139; *Eager* v. *Furnivall*, 17 Ch. D. 115; see Williams on Settlements, 105—108.

(*l*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*m*) See Lewin on Trusts, 620 *sq.*, 6th ed.; 920 *sq.*, 10th ed.

(*n*) Stat. 33 & 34 Vict. c. 93, passed 9th Aug., 1870, and repealed as from the 1st Jan., 1883, without prejudice to any right acquired while it was in force by stat. 45 & 46 Vict. c. 75, ss. 22, 25.

(*o*) See sects. 1, 7, 8, 10; Wms. Pers. Prop. 188—190, 15th ed.

woman, married after the passing of the Act, as heiress or co-heiress of an intestate (*p*).

The Married Women's Property Act, 1882.

The capacity of wives with regard to property was completely altered by the Married Women's Property Act, 1882 (*q*), which came into operation on the 1st of January, 1883 (*r*). By this Act, a married woman is capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*s*). Every woman married after the commencement of the Act, is entitled to hold and dispose of, as her separate property, all real and personal property which belonged to her at the time of marriage, or shall be acquired by or devolve upon her after marriage (*t*). Every woman married before the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property, to which her title has accrued after the commencement of the Act (*u*). But the Act is not to interfere with any settlement made (*x*) or to be made respecting the property of any married woman, or to interfere with or render inoperative any restriction against anticipation attached or to be attached to the enjoyment by a married woman of any property or income (*y*). As we have seen, the Act also gave to married women the power to contract at law with respect to their separate property, to which they are entitled without restraint on anticipation (*z*). It is thought that, if any real estate, which becomes the separate property of a wife by virtue of this Act,

(*p*) Sect. 8, which, however, takes effect subject and without prejudice to the trusts of any settlement affecting such property; and is held not to make the fee simple of such property subject to a trust for the woman's separate use: *Johnson* v. *Johnson*, 35 Ch. D. 345.

(*q*) Stat. 45 & 46 Vict. c. 75.

(*r*) Sect. 25.

(*s*) Sect. 1. sub-s. 1.

(*t*) Sect. 2.

(*u*) Sect. 5; see *Reid* v. *Reid*, 31 Ch. D. 402.

(*x*) See *Hancock* v. *Hancock*, 38 Ch. D. 78.

(*y*) Sect. 19.

(*z*) *Ante*, p. 293.

should have been limited to her directly, the legal estate will vest in her alone, and her husband will not acquire any estate therein or right to receive the rents and profits during the continuance of the coverture. And if any real estate should, since the commencement of the Act, be limited to trustees on trust for a wife, her equitable estate therein will be her separate property by virtue of the Act, though no trust for her separate use should have been imposed (*a*). It is held, however, that a husband shall be tenant by the curtesy of real estate of inheritance, which was his wife's separate property by virtue of the Act of 1882, and as to which she died intestate (*b*). But as in the case of a fee simple settled to the wife's separate use (*c*), there can be no curtesy of her statutory separate property, of which she has disposed in her lifetime or by will. Subject to the husband's right to curtesy, any estate in fee simple, which was the wife's separate property, descended upon her intestacy, to the heir of the last purchaser, according to the previous law (*d*). But since the commencement of the Land Transfer Act, 1897 (*e*), it appears that a wife's separate real estate vests after her death in her executors or administrator, whether she devised the same or not; and that in case of her intestacy her husband, as well as her heir, has at first an equitable title only, and has no estate by the curtesy at law until the lands, not being required for payment of the wife's debts or funeral, testamentary or administration expenses, have been duly conveyed to him by her personal representatives (*f*).

Curtesy of wife's separate property.

(*a*) See Wms. Conv. Stat. 382, 383, 418, 419, 421; *Re Lumley*, 1896, 2 Ch. 690.

(*b*) *Hope* v. *Hope*, 1892, 2 Ch. 336.

(*c*) *Ante*, p. 306.

(*d*) *Ante*, p. 302; see Wms. Conv. Stat. 452, 459, 460.

(*e*) Stat. 60 & 61 Vict. c. 65, Part I.: *ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218, 252, 282.

(*f*) Where a wife dies after 1897, leaving a husband entitled to an estate by the curtesy *at common law*, the question arises whether the Land Transfer Act, 1897, Part I., operates so as to divest him in any way of that legal estate for his own life which he had already obtained by the birth of issue; see *ante*, p. 300;

Wife's power of disposition over her separate property.

A wife may now dispose during coverture of her statutory separate property, whether real or personal, by the same means by which a single woman may transfer property of the like nature. She may therefore convey any legal estate of freehold, which is her separate property, by deed of grant, without the necessity of acknowledgment or of her husband's concurrence (*g*). But she may still be deprived of the power of disposition by a restraint on anticipation (*h*). So a wife may devise by will any legal estate in fee simple, which belongs to her separately under the Act. For the general effect of the Act is to invest married women with a special capacity of acquiring and exercising *legal* rights of ownership, apart from their husbands, in respect of any property which becomes their separate property by virtue of the Act (*i*). It is held, however, that the Act has not repealed the old rule of construction, that in gifts to husband and wife and others in joint tenancy, or tenancy in common, the husband and wife become entitled only to the share of one person

2 Black. Comm. 126. And a like question seems to arise where the husband is entitled in equity to curtesy in lands limited before 1883 to trustees on trust for his wife in fee, but not for her separate use: see *ante*, p. 307. Perhaps it may be considered that in these cases the husband has a right to take by survivorship within the meaning of sect. 1 of the Act; *ante*, p. 213. But where a wife dying after 1897 was entitled to lands under a trust created before 1883 for her separate use in fee, it appears that her estate vests first in her executors or administrator.

(*g*) *Re Drummond and Davies' Contract*, 1891, 1 Ch. 524; see *ante*, p. 308.

(*h*) *Ante*, p. 307; *Re Lumley*, 1896, 2 Ch. 690.

(*i*) See *Re Price*, 28 Ch. D. 709; *Re Cano*, 43 Ch. D. 12; *Re Bowen*, 1892, 2 Ch. 291. The two first cases decided that a will made by a wife during coverture was not effectual by virtue of the Act to pass property acquired by her after her husband's death. These decisions followed the law laid down before the Act in the case of wills made by wives of their separate estate, and not re-executed after their husband's death; *Willock* v. *Noble*, L. R. 7 H. L. 580. But now, by the effect of stat. 56 & 57 Vict. c. 63, s. 3, the will of a married woman made during coverture is to take effect as if it had been executed immediately before her death, whether she had or had not any separate property at the time of making it, and need not be re-executed after her husband's death; *Re Wylie*, 1895, 2 Ch. 116.

between them (*k*). But on a gift of lands to husband and wife jointly, made after the commencement of the Act of 1882, it appears that they take no longer by entireties, but as joint tenants (*l*). It is thought, too, that a husband may now convey any real estate to his wife directly, to be held by her as her separate property under the Act; and that a wife may now convey to her husband any real estate which she holds as her separate property by virtue of the Act (*m*).

Powers of wife under Settled Land Act, 1882.

Under the Settled Land Act, 1882 (*n*), if a married woman, tenant for life of land, be entitled for her separate use, or as her separate property by statute, she may exercise the powers given by the Act without her husband; but if she be otherwise entitled, these powers are exerciseable by her and her husband together. A restraint on anticipation shall not prevent the exercise by a married woman of any power under this Act (*o*).

Married woman trustee.

If a married woman were a trustee of land, the legal estate therein became subject to her husband's common law rights, and could only be conveyed with his concurrence in the usual way (*p*); but in equity he was merely a trustee of his legal rights, and could be compelled to execute the trust (*q*). Since 1874 (*r*), however, when any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee (*s*), she may convey or surrender the same as if she were a *feme sole*.

(*k*) *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148; see *ante*, p. 301. In this, as in other respects, the Act has received a decidedly narrow interpretation. This rule of construction is entirely at variance with the common sense of laymen.

(*l*) *Re March*, 27 Ch. D. 166; *Thornley* v. *Thornley*, 1893, 2 Ch. 229; see *ante*, p. 305.

(*m*) See Wms. Conv. Stat. 391, 392, *ante*, p. 305.

(*n*) Stat. 45 & 46 Vict. c. 38, s. 61, sub-ss. 2, 3.

(*o*) Sect. 61, sub-s. 6.

(*p*) *Ante*, p. 303.

(*q*) Lewin on Trusts, 32, 215, 6th ed.: 32, 265, 10th ed.

(*r*) Stat. 56 & 57 Vict. c. 53, s. 16, replacing 37 & 38 Vict. c. 78, s. 6.

(*s*) See *Re Docwra*, 29 Ch. D. 693; *Re Cunningham & Frayling*, 1891, 2 Ch. 567.

It was thought, after the passing of the Married Women's Property Act, 1882, that if a female trustee of land married after the year 1882, or if land were conveyed after 1882 to a wife as trustee, she might convey the legal estate therein as her separate property under the Act (*t*). But the contrary has been decided (*u*).

Rights of the wife in the lands of her husband.

2. As to the rights of the wife in the lands of her husband. A man's capacity for disposing of his own estates in land remains unchanged by the act of marriage; and during a husband's life, the law does not give to the wife any control over his powers of disposition or any interest in the rents or profits of his land. After her husband's death, however, a widow becomes, in some cases, entitled to a life interest in part of her late husband's lands. This interest is termed the dower of the wife. By the Dower Act of 1833 (*x*), the dower of women married after the 1st of January, 1834, was placed on a different footing from that of women who were married previously. But as the old law of dower continued to regulate the rights of all women who were married on or before that day, it will be desirable, in the first place, to give some account of the old law before proceeding to the new.

Dower.

Dower previously to the Act.

Dower, as it existed previously to the operation of the Dower Act, was of very ancient origin, and retained an inconvenient property which accrued to it in the simple times when alienation of lands was far less frequent than at present. If at any time during the coverture the husband were solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands to

(*t*) See Lewin on Trusts, 36, 8th ed.; 35, 9th ed.; 1 Dart, V. & P. 13, 588, 6th ed.: Wms. Conv. Stat. 386—388; Wolstenholme's Conveyancing & Settled Land Acts, 246, 270, 7th ed.

(*u*) *Re Harkness & Allsopp's Contract*, 1896, 2 Ch. 358. This rule, which affords another instance of the narrow interpretation placed upon the statute, does not apply in the case of a wife entitled as mortgagee; *Re Brooke & Fremlin's Contract*, 1898, 1 Ch. 647.

(*x*) Stat. 3 & 4 Will. IV. c. 105.

which any issue, which the wife might have had, might by possibility have been heir (*y*), she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life (*z*). This right having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed as long as the wife lived. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, even of those owing to the Crown (*a*). It was necessary, however, that the husband should be seised of an estate of inheritance at law; for the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands (*b*). The estate, moreover, must have been held in severalty or in common, and not in joint tenancy: for the unity of interest which characterizes a joint tenancy forbids the intrusion into such a tenancy of the husband or wife of any deceased joint tenant; on the decease of any joint tenant, his surviving companions are already entitled, under the original gift, to the whole subject of the tenancy (*c*). The estate was also required to be an estate of inheritance in possession; although a

Dower could only be released by fine.

Dower independent of husband's debts.

A legal seisin required.

Estate must not be joint.

(*y*) Litt. ss. 36, 53; 2 Black. Comm. 131; 1 Rop. Husb. & Wife, 332.

(*z*) See *Dickin* v. *Hamer*, 1 Dr. & Sm. 284; P. & M. Hist. Eng. Law, ii. 418—425.

(*a*) Co. Litt. 31 a; 1 Rop. Husb. & Wife, 411.

(*b*) 1 Rop. Husb. & Wife, 354.

(*c*) *Ibid.* 366: *ante*, p. 134, *sq.*

seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach (*d*). In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited. The dower of the widow in gavelkind lands consisted, and still consists, like the husband's curtesy, of a moiety, and continues only so long as she remains unmarried and chaste (*e*).

Dower of gavelkind lands.

In order to prevent this inconvenient right from attaching on newly-purchased lands, and to enable the purchaser to make a title at a future time, without his wife's concurrence, various devises were resorted to in the framing of purchase-deeds. The old-fashioned method of barring dower was to take the conveyance to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser; but, as to the estate of the trustee, it was declared to be in trust only for the purchaser and his heirs. By this means the purchaser and the trustee became joint tenants for life of the legal estate, and the remainder of the inheritance belonged to the purchaser. If, therefore, the purchaser died during the life of his trustee, the latter acquired in law an estate for life by survivorship; and as the husband had never been solely seised, the wife's dower never arose; whilst the estate for life of the trustee was subject in equity to any disposition which the husband might think fit to make by his will. The husband and his trustee might also, at any time during their joint lives, make a valid conveyance to a purchaser without the wife's concurrence. The defect of the plan was, that if the trustee happened to die during the husband's life, the latter became at once solely seised of an estate in fee simple in possession; and the wife's right to dower accordingly attached.

Old method of barring dower.

(*d*) Co. Litt. 31 a. Rob. Gav. book 2, c. 2.
(*e*) Bac. Abr. Gavelkind (A.);

Moreover, the husband could never make any conveyance of an estate in fee simple without the concurrence of his trustee so long as he lived. This plan, therefore, gave way to another method of framing purchase-deeds, which will be hereafter explained (*f*), and by means of which the wife's dower under the old law was effectually barred, whilst the husband alone, without the concurrence of any other person, could effectually convey the lands.

Jointure.

The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife previously to marriage, in lieu of dower. This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses (*g*), which, by turning uses into legal estates, of course rendered them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least (*h*). If the jointure were made after marriage, the wife might elect between her dower and her jointure (*i*). A legal jointure, however, was in modern times seldom resorted to as a method of barring dower: when any jointure was made, it was usually merely of an equitable kind: for if the intended wife were of age, and a party to the settlement, she was competent, in equity, to extinguish her title to dower upon any terms to which she might think proper to agree (*k*). And if the wife should have accepted an equitable jointure, the Courts of equity would effectually restrain her from setting up any claim to her dower.

Equitable jointure.

(*f*) See *post*, the chapter on Executory Interests.
(*g*) 27 Hen. VIII. c. 10.
(*h*) Co. Litt. 36 b; 2 Black. Comm. 137; 1 Rop. Husb. & Wife. 462.
(*i*) 1 Rop. Husb. & Wife. 468.
(*k*) *Ibid.* 488; *Dyke* v. *Rendall*, 2 De G. M. & G. 209.

But in equity, as well as at law, the jointure, in order to be an absolute bar of dower, was required to be made before marriage.

Dower under the Act.

The dower of women married since the 1st of January, 1834, may be barred by the acceptance of a jointure in the same manner as before; but, in their case, the doctrine of jointures is of very little moment. For, by the Dower Act (*l*), the dower of such women has been placed completely within the power of their husbands. Under the Act no widow is entitled to dower out of any land, which shall have been absolutely disposed of by her husband in his lifetime or by his will, or in which he shall have devised any estate or interest for her benefit, unless (in the latter case) a contrary intention shall be declared by his will (*m*). And all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower (*n*). The husband may also either wholly or partially deprive his wife of her right to

(*l*) 3 & 4 Will. IV. c. 105. Gavelkind lands are within the Act; *Farley* v. *Bonham*, 2 John. & H. 177.

(*m*) 3 & 4 Will. IV. c. 105, ss. 4, 9: see *Lacey* v. *Hill*, L. R. 19 Eq. 346.

(*n*) Sect. 5. The opinion has been expressed that, notwithstanding the above words, the widow's dower is paramount to the claims of her late husband's creditors, who have not in his lifetime obtained a charge (see *ante*, pp. 264—269) on his lands: Romilly, M. R., *Spyer* v. *Hyatt*, 20 Beav. 621; Wood, V.-C., *Jones* v. *Jones*, 4 K. & J. 361. In neither of these cases, however, was the expression of this opinion necessary to the decision. *Spyer* v. *Hyatt* was a case of freebench (see *post*, Part III. Ch. II.); and it had been previously decided that the Dower Act has no application to freebench; *Smith* v. *Adams*, 18 Beav. 499, 5 De G. M. & G. 712; so Lord Romilly's *dictum* was peculiarly gratuitous. *Jones* v. *Jones* was the case of a mortgage by the husband. It is submitted that, according to the ordinary meaning of the words used in the Act, a man's lands are by stat. 3 & 4 Will. c. 104 (*ante*, p. 275) made "subject or liable" to his debts, notwithstanding that his creditors have no charge thereon. And by the Land Transfer Act, 1897, s. 2 (3) (*ante*, p. 214), a man's real estate is made subject to the same liabilities for debt as his personal estate. And see Williams on Settlements, 94.

dower, by any declaration for that purpose made by him, by any deed, or by his will (*o*). As some small compensation for these sacrifices, the Act has granted a right of dower out of lands to which the husband has a right merely without having had even a legal seisin (*p*); dower is also extended to equitable as well as legal estates of inheritance in possession, excepting of course estates in joint tenancy (*q*). The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support,—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way, as a sort of common form, into many purchase-deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But, surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and far superior, if the heir be a lineal ancestor, or remote relation (*r*). The proper method seems therefore to be, to omit any such declaration against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them. The charge given to a widow on her husband's real estate by the Intestates' Estates Act, 1890 (*s*), must be satisfied by sale or mortgage of a competent part of such real estate, before the wife can claim her dower thereout (*t*).

Declaration against dower.

(*o*) Sects. 6, 7, 8. See *Fry* v. *Noble*, 20 Beav. 598, 7 De Gex, M. & G. 687; *Re Greenwood*, 1892, 2 Ch. 295.

(*p*) Sect. 3.

(*q*) Sect. 2; *Fry* v. *Noble*, 20 Beav. 598; *Clarke* v. *Franklin*, 4 Kay & J. 266.

(*r*) Sugd. Vend. & Pur. 545, 11th ed.

(*s*) *Ante*, p. 226.

(*t*) *Re Charriere*, 1896, 1 Ch. 912.

Assignment of dower.

A widow entitled to dower at common law had, as a rule, no *estate* in her husband's lands until her equal third part thereof had been duly set out and assigned to her after his death (*u*); and in this respect the law was not altered by the Dower Act. But the widow's *right* to her dower was enforceable at first by real action (*x*), and afterwards by suit in equity as well (*y*), and can now be asserted by action in the High Court of Justice (*z*). Where a husband has died after the year 1897, leaving a widow entitled to dower out of his estates in fee simple, she must of course seek the assignment of her dower from his personal representatives, so long as they retain the estates at law, as well as from the heir, whose beneficial title is not, as we have seen (*a*), divested. Assignment of dower may be made by parol only, and does not require a deed (*b*). After the widow has entered upon the land so assigned to her, she becomes seised thereof and acquires, as from her husband, an estate for life therein as tenant in dower (*c*). By the Settled Estates Act, 1877, every tenant in dower may grant the same leases as a tenant by the curtesy, or other tenant for life is thereby empowered to grant (*d*).

Leases by tenant in dower.

(*u*) *Ante*, p. 315: Co. Litt. 34 b, 37; 2 Black. Comm. 135: *R.* v. *Northweald Bassett*, 2 B. & C. 724, 728; *Brown* v. *Meredith*, 2 Keen. 527; see *Marshall* v. *Smith*, 5 Giff. 37. Of lands let for a term of years, and of an undivided share in land, the widow takes a third part of the rents and profits as her dower without any assignment: 1 Rob. Husb. & Wife, 342, 343, 371, 395; Williams on Settlements, 89.

(*x*) 1 Rop. Husb. & Wife, 429 *sq.* When real actions were abolished in 1833, writs for the recovery of dower were excepted: but in 1860 these writs were abolished, and the form of an action for dower was assimilated to that of other common law actions: stats. 3 & 4 Will. IV. c. 27, s. 36; 23 & 24 Vict. c. 126, ss. 26, 27.

(*y*) 1 Rop. Husb. & Wife, 449; *Anderson* v. *Pigott*, L. R. 11 Eq. 329, 8 Ch. 180.

(*z*) See R. S. C. 1883, App. A., Part III., s. 4.

(*a*) *Ante*, pp. 29, 74, 84, 85, 131, 137, 183, 187, 202, 214, 219.

(*b*) Co. Litt. 35 a; *Roice* v. *Power*, 2 Bos. & Pul. N. R. 1, 34.

(*c*) Rop. Husb. & Wife, 392, 411, 416; Williams on Settlements, 89.

(*d*) Stat. 40 & 41 Vict. c. 18, s. 46. See *ante*, p. 118, n. (*m*).

PART II.

OF INCORPOREAL HEREDITAMENTS.

Our attention has hitherto been directed to the nature and incidents of freehold estates in land, of which the tenant has *possession*. As has been already explained (*a*), such estates are ranked in law as corporeal hereditaments, because the owner's right is accompanied with the possession of a tangible thing; while estates in or rights over land, which is in the possession of another, are termed incorporeal, as being mere rights or bare rights unaccompanied with the possession of anything tangible. Incorporeal hereditaments will form the next subject for our consideration. They are not such an obvious source of fruitful enjoyment as is the actual occupation of land: but, being *valuable* things, they are included in property as well as tangible things (*b*). As we have seen (*c*), there was formerly a further distinction between corporeal and incorporeal hereditaments in the formalities required for their transfer. For at the common law corporeal hereditaments were mainly transferable by that livery of seisin, which was essential to a feoffment; wherefore they were said to lie in livery. While incorporeal hereditaments, when transferred apart from the possession of land, were always required to be conveyed by the delivery of a sealed writing, that is, by deed (*d*). They were therefore said to lie in grant. For the word *grant*, though it comprehends all kinds of conveyances, yet

(*a*) *Ante*, p. 30.
(*b*) *Ante*, p. 5.
(*c*) *Ante*, p. 31.
(*d*) *Ante*, pp. 31, 143, 149.

New enactment.

more strictly and properly taken, is a conveyance by deed only (*e*). But as we have seen (*f*), the Real Property Act of 1845 provided that all corporeal hereditaments should be deemed to lie in grant as well as in livery (*g*); and thus made them transferable by deed in the same manner as incorporeal hereditaments. There is, accordingly, now no difference between these two classes of property, as regards means of conveyance. But the essential distinction between rights of ownership in possession and bare rights (*h*) of course remains.

(*e*) Shep. Touch. 228.
(*f*) *Ante*, p. 201.
(*g*) Stat. 8 & 9 Vict. c. 106, s. 2.
(*h*) *Ante*, p. 5.

CHAPTER I.

OF A REVERSION AND A VESTED REMAINDER.

The first kind of incorporeal hereditament which we shall mention is somewhat of a mixed nature, being at one time incorporeal, at another not: and, for this reason, it is not usually classed with those hereditaments which are essentially and entirely of an incorporeal kind. But as this hereditament partakes, during its incorporeal existence, very strongly of the nature and attributes of other incorporeal hereditaments, particularly in its always permitting, and generally requiring, a deed of grant for its transfer,—it is here classed with such hereditaments. It is called, according to the mode of its creation, a *reversion* or a *vested remainder*.

If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only a part, or *particula*, of the estate in fee (*a*). And during

Particular estate.

(*a*) 2 Black. Comm. 165.

the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time —is called his *reversion* (*b*).

Reversion.

If at the same time with the grant of the particular estate, he should also dispose of this remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is termed, not a *reversion* but a *remainder* (*c*). Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties (*d*).

Remainder.

A remainder arises from express grant.

A reversion on a lease for years

1. And, first, of a reversion. If the tenant in fee simple should have made a lease merely for a term of years, his reversion is looked on, in law, precisely as a continuance of his old estate, with respect to himself and his heirs, and to all other persons but the tenant for years. The owner of the fee simple is regarded as having simply placed a bailiff on his property (*e*); and the consequence is, that, subject to the lease, the owner's rights of alienation remain unimpaired, and may be exercised in the same manner as before. The feudal possession or *seisin* has not been parted with. And a conveyance of the reversion may, therefore, be made by a feoffment with livery of *seisin*, made with

may be conveyed by feoffment or

(*b*) Co. Litt. 22 b. 142 b.

(*c*) Litt. ss. 215. 217. As to the origin of these terms, see P. & M. Hist. Eng. Law, ii. 21.

(*d*) 2 Black. Comm. 163.

(*e*) Watk. Descents, 108 (113, 4th ed.); *ante*, p. 18.

the consent of the tenant for years (*f*). But, if this mode of transfer should not be thought eligible, a grant by deed will be equally efficacious. For the estate of the grantor is strictly incorporeal, the tenant for years having the actual possession of the lands: so long, therefore, as such actual possession continues, the estate in fee simple is strictly an incorporeal reversion, which, together with the *seisin* or feudal possession, may be conveyed by deed of grant (*g*). But, if the tenant in fee simple should have made a lease for life, he must have parted with his *seisin* to the tenant for life; for an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal seisin (*h*). No feoffment can consequently be made by the tenant in fee simple; for he has no seisin of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed, like all other incorporeal hereditaments when apart from what is corporeal, by a deed of grant (*i*).

by deed of grant.

A reversion on a lease for life

must be conveyed by deed of grant.

We have before mentioned (*k*), that in the case of a lease for life or gift in tail made by a tenant in fee simple, a tenure is created between the parties, the lessee for life or donee in tail holding his estate of the freeholder in fee as lord. So in the case of a lease for years, the lessee upon entry becomes tenant to the lessor, and the relation of the one to the other is also called a tenure (*l*); although, as we have seen (*m*), this

Tenure of leaseholder.

(*f*) Co. Litt. 48 b, n. (8).
(*g*) Perkins, s. 221; *Doe* d. *Were* v. *Cole*, 7 B. & C. 243, 248; *ante*, pp. 156, 196.
(*h*) Watk. Descents, 109 (114, 4th ed.); *ante*, pp. 63, 144.
(*i*) Shep. Touch. 230.
(*k*) *Ante*, pp. 107, 112.
(*l*) Litt. ss. 58, 132, 465, 567—572, 576, 577, 586, 590, 591; Co. Litt. 93 b.
(*m*) *Ante*, pp. 16—20, 28, 61.

Fealty.

relation was treated as lying outside the law of free tenure. Still an oath of fealty has always been incident to the tenure of an estate for years as to that of a freehold estate (*n*). And the rent reserved on a lease for years is called *rent service* equally with the rent due from a freeholder to his lord; and it is recoverable, if in arrear, by the same remedy of distress, which the common law accorded to the lords of freeholders for enforcing the services due from the latter (*o*). As we have seen (*p*), the oath of fealty is now never exacted, and a rent is rarely reserved on the creation of an estate for life or in tail: as these estates usually arise under family settlements. In the case of a lease for years, however, the rent which may be reserved is of practical importance. Rent service is so called in order to distinguish it from other kinds of rent, to be spoken of hereafter, which have nothing to do with the services anciently rendered by a tenant to his lord. It consists usually, but not necessarily, of money; for it may be rendered in corn, or in anything else. Thus, an annual rent of one peppercorn is sometimes reserved to be paid, when demanded, in cases where it is wished that lands should be holden rent free, and yet that the landlord should be able at any time to obtain from his tenant an acknowledgment of his tenancy. To the reservation of a rent service, a deed was formerly not absolutely necessary (*q*). For, although the rent is an incorporeal hereditament, yet the law considered that the same ceremony, by which the nature and duration of the estate were fixed and evidenced, was sufficient also to ascertain the rent to be paid for it. But, by the Real Property Act, 1845 (*r*), it is provided that a lease, required by law to be in writing, of any tenements or

Rent service.

A deed formerly unnecessary to the reservation of a rent.

Real Property Act, 1845.

(*n*) Bract. fo. 80 a; Litt. ss 131, 132; Co. Litt. 67 b, 93 b.

(*o*) Litt. ss. 58, 122, 213, 214 Co. Litt. 87 b, 142 a, b, 148 a *ante*, p. 66.

(*p*) *Ante*, pp. 55, 108, 113.

(*q*) Litt. s. 214; Co. Litt. 143 a.

(*r*) Stat. 8 & 9 Vict. c. 106, s. 3. repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

hereditaments shall be void at law, unless made by deed. In every case, therefore, where the Statute of Frauds (*s*) has required leases to be in writing, they must now be made by deed. But, according to the exception in that statute (*t*), where the lease does not exceed three years from the making, a rent of two-thirds of the full improved value, or more, may still be reserved by parol merely. Rent service, when created, is considered to be issuing out of every part of the land in respect of which it is paid (*u*); one part of the land is as much subject to it as another. The common law remedy of distress for the recovery of rent service was by seizing the goods of the tenant, or any other person, found on any part of the premises, and impounding them, as a pledge for payment (*x*). But the sale of goods distrained for rent was authorized by a statute of William and Mary (*y*). This remedy for the recovery of rent service belongs to the landlord of common right, without any express agreement (*z*).

Rent issues out of every part of the lands.

Distress.

In addition to the remedy by distress, there is usually contained in leases a condition of re-entry, empowering the landlord, in default of payment of the rent for a certain time, to re-enter on the premises and hold them as of his former estate. When such a condition is inserted, the estate of the tenant, whether for life or years, becomes determinable on such re-entry. By the

Condition of re-entry.

(*s*) Stat. 29 Car. II. c. 3, *ante*, p. 153.

(*t*) Sect. 2.

(*u*) Co. Litt. 47 a, 142 a.

(*x*) Co. Litt. 47 a; 3 Black. Comm. 6—14.

(*y*) Stat. 2 Wm. & Mary, c. 5. The landlord's privilege of distress was further extended by stats. 8 Anne, c. 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19; 3 & 4 Will. IV. c. 42, ss. 37, 38; 14 & 15 Vict. c. 25, s. 2. But later statutes have restricted the right to distrain for rent; see stats. 34 & 35 Vict. c. 79, protecting the goods of lodgers; 35 & 36 Vict. c. 50, protecting railway rolling stock; 46 & 47 Vict. c. 61, ss. 44—55, limiting the right to distrain upon agricultural holdings; 51 & 52 Vict. c. 21, generally amending the law of distress for rent; Woodfall, Landlord and Tenant, Ch. XI., 14th ed.

(*z*) Litt. ss. 213, 214. It must be made between sunrise and sunset, *Tutton* v. *Darke*, 5 H. & N. 647.

common law, before any entry could be made or action brought under a proviso or condition for re-entry on non-payment of rent, the landlord was required to make a demand, upon the premises, of the precise rent due, at a convenient time before sunset of the last day when the rent could be paid according to the condition; thus, if the proviso were for re-entry on non-payment of the rent by a space of thirty days, the demand must have been made on the evening of the thirtieth day (*a*). But now, by an Act of 1852, replacing a statute of George II., if half a year's rent be due, and no sufficient distress be found on the premises (*b*), the landlord may, at the expiration of the period limited by the proviso for re-entry (*c*), recover the premises by action, without any formal demand or entry (*d*); but all proceedings are to cease on payment by the tenant of all arrears and costs, at any time before the trial (*e*). Formerly, the tenant might, at an indefinite time after he had been ejected, have filed his bill in the Court of Chancery, and he would have been relieved by that Court from the forfeiture he had incurred, on his payment to his landlord of all arrears and costs. But by the same statutes the right of the tenant to apply for relief in equity was restricted to six calendar months next after the execution of the judgment on the ejectment (*f*); and under an Act of 1860, the same relief was allowed to be given by the Courts of Law (*g*). And if the landlord recover possession of the premises, under a proviso for re-entry on non-payment

Demand formerly required.

Modern proceedings

(*a*) Co. Litt. 201 b, 202 a; 1 Wms. Saund. 287, n. (16); *Cocks* v. *Phillips*, 5 H. & N. 183.

(*b*) See *Thomas* v. *Lulham*, 1895, 2 Q. B. 400.

(*c*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.

(*d*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II. c. 28, s. 2. See R. S. C. 1883, Ord. iii. r. 6.

(*e*) Stat. 15 & 16 Vict. c. 76, s. 212, re-enacting stat. 4 Geo. II. c. 28, s. 4. An undertenant has the same privilege: *Doe* d. *Wyatt* v. *Byron*, 1 C. B. 623.

(*f*) Stat. 4 Geo. II. c. 28, s. 2, now replaced by 15 & 16 Vict. c. 76, s. 210; *Bowser* v. *Colby*, 1 Hare, 109; *Stanhope* v. *Haworth*, 3 Times L. R. 34.

(*g*) Stat. 23 & 24 Vict. c. 126, s. 1.

of rent, by entry and not by action (*h*) (in which case he must still make a formal demand for the rent, unless he be excused from doing so by the terms of the proviso (*i*)), the tenant will have a similar right to relief (*k*). In ancient times, also, the benefit of a condition of re-entry could belong only to the landlord and his heirs; for the law would not allow of the transfer of a mere conditional right to put an end to the estate of another (*l*). A right of re-entry was considered in the same light as the right to bring an action for money due: which right in ancient times was not assignable. This doctrine sometimes occasioned considerable inconvenience; and in the reign of Henry VIII. it was found to press hardly on the grantees from the Crown of the lands of the dissolved monasteries. For these grantees were of course unable to take advantage of the conditions of re-entry, which the monks had inserted in the leases of their tenants. A parliamentary remedy was, therefore, applied for the benefit of the favourites of the Crown; and the opportunity was taken for making the same provision for the public at large. A statute was accordingly passed (*m*), which enacts, that as well the grantees of the Crown as all other persons being grantees (*n*) or assignees, their heirs, executors, successors and assigns, shall have the like advantages against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their heirs or successors. might at any time have had or enjoyed: and this statute is still in force. It is also provided by the Conveyancing Act of 1881, with regard only to leases

The benefit of a condition of re-entry formerly inalienable.

Remedy by statute.

(*h*) *Ante*, p. 64.

(*i*) A proviso for re-entry on non-payment of rent without making any demand for the rent is lawful and is frequently made: *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490.

(*k*) *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

(*l*) Litt. ss. 347. 348: Co. Litt. 265 a. n. (1).

(*m*) Stat. 32 Hen. VIII. c. 34: Co. Litt. 215 a: *Isherwood* v. *Oldknow*, 3 M. & S. 382. 394.

(*n*) A lessee of the reversion is within the Act: *Wright* v. *Burroughes*, 3 C. B. 685.

made after the year 1881 (*o*), that every condition of re-entry and other condition contained in a lease shall be incident to the reversionary estate in the land, and shall be capable of being enforced by the person from time to time entitled, subject to the term, to the income of the land leased. The landlord may also sue his tenant personally for rent due to him.

Rent service passes by grant of the reversion.

Rent service, being incident to the reversion, passes by a grant of such reversion without the necessity of any express mention of the rent (*p*). Formerly no grant could be made of any reversion without the consent of the tenant, expressed by what was called his *attornment* to his new landlord (*q*). It was thought reasonable that a tenant should not have a new landlord imposed upon him without his consent; for, in early times, the relation of lord and tenant was of a much more personal nature than it is at present. The tenant, therefore, was able to prevent his lord from making a conveyance to any person whom he did not choose to accept as a landlord; for he could refuse to attorn tenant to the purchaser, and without attornment the grant was invalid. The landlord, however, had it always in his power to convey his reversion by the expensive process of a *fine* duly levied in the Court of Common Pleas; for this method of conveyance, being judicial in its nature, was carried into effect without the tenant's concurrence; and the attornment of the tenant, which for many purposes was desirable, could in such case be compelled (*r*). It can easily be imagined, that a doctrine such as this was found inconvenient when the rent paid by the tenant became the only service of any benefit rendered to the landlord.

Attornment.

Fine.

Attornment bolished.

The necessity of attornment to the validity of the grant of a reversion was accordingly abolished by a statute of

(*o*) Stat. 44 & 45 Vict. c. 41, s. 10.

(*p*) Litt. ss. 228, 229, 572; Perk. s. 113.

(*q*) Litt. ss. 551, 567, 568, 569; Co. Litt. 309 a. n. (1).

(*r*) Shep. Touch. 254.

Anne (*s*). But the statute very properly provides (*t*), that no tenant shall be prejudiced or damaged by payment of his rent to the grantor, or by breach of any condition for non-payment of rent, before notice of the grant shall be given to him by the grantee. And by a further statute (*u*), any attornment which may be made by tenants without their landlord's consent, to strangers claiming title to the estate of their landlords, is rendered null and void. Nothing, therefore, is now necessary for the valid conveyance of any rent service, but a grant by deed of the reversion, to which such rent is incident. When the conveyance is made to the tenant himself, it is called a *release* (*x*).

Rent formerly lost by destruction of the reversion.

The doctrine, that rent service, being incident to the reversion, always follows such reversion, formerly gave rise to the curious and unpleasant consequence of the rent being sometimes lost when the reversion was destroyed. For it is possible, under certain circumstances, that an estate may be destroyed and cease to exist. For instance, suppose A. to have been a tenant of lands for a term of years, and B. to have been his undertenant for a less term of years at a certain rent; this rent was an incident of A.'s reversion, that is, of the term of years belonging to A. If, then, A.'s term should by any means have been destroyed, the rent paid to him by B. would, as an incident of such term, have been destroyed also. Now, by the rules of law, a conveyance of the immediate fee simple to A. would at once have destroyed his term,—it not being possible that the term of years and the estate in fee simple should subsist together. In legal language the term of years would have been *merged* in the larger estate in fee simple; and the term being merged and gone, it followed as a necessary

Merger.

(*s*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 9. See *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*t*) Sect. 10.

(*u*) Stat. 11 Geo. II. c. 19, s. 11.

(*x*) *Ante*, p. 196.

Leases surrendered in order to be renewed.

consequence, that all its incidents, of which B.'s rent was one, ceased also (*y*). This unpleasant result was some time since provided for and obviated with respect to leases surrendered in order to be renewed,—the owners of the new leases being invested with the same right to the rent of undertenants, and the same remedy for recovery thereof, as if the original leases had been kept on foot (*z*). But in all other cases the inconvenience continued, until a remedy was provided by the Act to simplify the transfer of property (*a*). This Act, however, was shortly afterwards repealed by the Real Property Act, 1845 (*b*), which provides, in a more efficient though somewhat crabbed clause (*c*), that, when the reversion expectant on a lease, made either before or after the passing of the Act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merge, the estate, which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

Real Property Act, 1845.

A remainder.

2. A remainder chiefly differs from a reversion in this, —that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But as all estates must be holden of some person,—in the case of a grant of a particular estate with a remainder

No tenure between particular tenant and remainderman.

(*y*) *Webb* v. *Russell*, 3 T. R. 393. 1 R. R. 725.

(*z*) Stat. 4 Geo. II. c. 28, s. 6; 3 Prest. Conv. 138; *Cousins* v. *Phillips*, 3 H. & C. 892; extended to Crown lands by stat. 8 & 9 Vict. c. 99, s. 7.

(*a*) Stat. 7 & 8 Vict. c. 76, s. 12.

(*b*) Stat. 8 & 9 Vict. c. 106.

(*c*) Sect. 9.

in fee simple,—the particular tenant and the remainder-man both hold their estates of the same chief lord as their grantor held before (*d*). It consequently follows, that no rent service is incident to a remainder, as it usually is to a reversion; for rent service is an incident of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder we have already noticed (*e*), namely, that a reversion arises necessarily from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

No rent service.

We have seen that the powers of alienation possessed by a tenant in fee simple enable him to make a lease for a term of years, or for life, or a gift in tail, as well as to grant an estate in fee simple. But these powers are not simply in the alternative, for he may exercise all these powers of alienation at one and the same moment; provided, of course, that his grantees come in one at a time, in some prescribed order, the one waiting for liberty to enter until the estate of the other is determined. In such a case the ordinary mode of conveyance is alone made use of; and until the passing of the Real Property Act, 1845 (*f*), if a feoffment should have been employed, there would have been no occasion for a *deed* to limit or mark out the estates of those who could not have immediate possession (*g*). The seisin would have been delivered to the first person who was to have possession (*h*); and if such person was to have been only a tenant for a term of years, such seisin would have immediately vested in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his estate,

Powers of alienation may be exercised concurrently.

(*d*) Litt. s. 215.
(*e*) *Ante*, p. 324.
(*f*) Stat. 8 & 9 Vict. c. 106, s. 3, *ante*, p. 154.
(*g*) Litt. s. 60; Co. Litt. 143 a.
(*h*) Litt. s. 60; 2 Black. Comm. 167.

the seisin, by whatever means vested in him, will devolve on the other grantees of freehold estates in the order in which their estates are limited to come into possession. So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people separately for their lives. In such case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seisin would be delivered, and all the rest are remaindermen; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease, or in case of his forfeiture, or otherwise. The third grantee must wait till the estate both of the first and second shall have determined; and so of the rest. The mode in which such a set of estates would be marked out is as follows:—To A. for his life, and after his decease to B. for his life, and after his decease to C. for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is meant. The estates of B. and C. and the rest are intended to be as immediately and effectually vested in them as the estate of A.; so that if A. were to forfeit his estate, B. would have an immediate right to the possession; and so again C. would have a right to enter, whenever the estates both of A. and B. might determine. But owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every ordinary deed. The words "and after his decease" are, therefore, considered a sufficient expression of an intention to confer a vested remainder after an estate for life. In the case we have selected of numerous

Example.

Words used to confer a vested remainder after a life interest.

estates, every one given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit; and should the first grantee survive all the others, and not forfeit his estate, not one of them will take anything. Nevertheless each one of these grantees has an estate for life in remainder, immediately *vested* in him; and each of these remainders is capable of being transferred, both at law and in equity, by a deed of grant, in the same manner as a reversion. In the same way, a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all an estate in fee simple to a fourth; and these grantees may be entitled to possession in any prescribed order, except as to the grantee of the estate in fee simple, who must necessarily come last; for his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees for ever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term of years; or the order may be reversed, and the term of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession till all the others shall have been determined. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail, as we have already seen. This risk it must run. But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, —it is then a *vested remainder*, and recognized in law as an estate grantable by deed (*i*). It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent possession being taken by the

A vested remainder may be conveyed by deed of grant.

Definition of a vested remainder.

(*i*) Fearne C. R. 216; 2 Prest. Abst. 113; Co. Litt. 265 a, n. (2).

remainderman. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession.

In all the cases which we have as yet considered, each of the remainders has belonged to a different person. No one person has had more than one estate. A., B. and C. may each have had estates for life; or the one may have had a term of years, the other an estate for life, and the last a remainder in tail or in fee simple. But no one of them has as yet had more than one estate.

One person may have more than one estate.

It is possible, however, that one person may have, under certain circumstances, more than one estate in the same land at the same time,—one of his estates being in possession, and the other in remainder, or perhaps all of them being remainders. The limitation of a remainder in tail, or in fee simple to a person who has already an estate of freehold, as for life, is governed by a rule of law, known by the name of the rule in *Shelley's case*,—so called from a celebrated case in Lord Coke's time, in which the subject was much discussed (*k*),—although the rule itself is of very ancient date (*l*). As this rule is generally supposed to be highly technical, and founded on principles not easily to be perceived, it may be well to proceed gradually in the attempt to explain it.

Rule in *Shelley's case*.

Grantee of a feudal estate regarded as taking only a personal interest.

We have seen that, according to feudal law, the grantee of an hereditary fief was considered as being entitled during personal enjoyment only, that is, for his life; while his heir was regarded as having been endowed with a substantial interest in the land. And these conceptions seem to have been imported into English law along with the principle of tenure (*m*). In

(*k*) *Shelley's case*, 1 Rep. 94, 104.

(*l*) Y. B. 18 Edw. II. 577, translated 7 Man. & Gr. 941, n. (*c*); 38 Edw. III. 26; 40 Edw. III. 9.

(*m*) *Ante*, p. 66.

early times after the Conquest therefore, if a grant of land were made to a man and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord: much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapters (*n*). A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs, to hold after his decease. It cannot, therefore, be wondered at, that a gift, expressly in these terms, "To A. for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well

To A. for his life, and after his decease to his heirs.

Words of limitation.

(*n*) *Ante*, pp. 65—74, 80, 261 *sq.*

as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs* and *heirs of his body*, are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee (*o*). At the present day, when the heir is perhaps the last person likely to get the estate, those words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance, that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee simple (*p*). And the circumstance, that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery.

Rule in *Shelley's case*, as to estates in possession.

Having proceeded thus far, we have already mastered the first branch of the rule in *Shelley's case*, namely, that which relates to estates in possession. This part of the rule is, in fact, a mere enunciation of the proposition already explained, that when the ancestor, by any gift or conveyance, takes an estate for life, and in the same gift or conveyance, an estate is immediately limited to his heirs in fee or in tail, the words "to his heirs" are words of limitation of the estate of the ancestor. Suppose, however, that it should anciently have been wished to interpose between the enjoyment of the lands by the ancestor and the enjoyment by the heir, the possession of some other party for some limited estate, as for his own life. Thus, let the estate have

As to estates in remainder.

(*o*) See *ante*, pp. 145—147; *Perrin* v. *Blake*, *ante*, p. 246.

(*p*) *Ante*, p. 69.

been given to A. and his heirs, but with a vested estate to B. for his own life, to take effect in possession next after the decease of A.—thus suspending the enjoyment of the lands by the heir of A., until after the determination of the life estate of B. In such a case it is evident that B. would have had a vested estate for his life, in remainder, expectant on the decease of A.; and the manner in which such remainder would have been limited, would, as we have seen (*q*), have been to A. for his life, and after his decease to B. for his life. The only question then remaining would be as to the mode of expressing the rest of his intention,—namely, that, subject to B.'s life estate, A. should have an estate in fee simple. To this case the same reasoning applies, as we have already made use of in the case of an estate to A. for his life, and after his decease to his heirs. For an estate in fee simple is an estate, by its very terms, to a man and his heirs. But, in the present case, A. would have already had *his* estate given him by the first limitation to himself for his life; nothing, therefore, would remain but to give the estate to his heirs, in order to complete the fee simple. The last remainder would, therefore, be to the heirs of A.; and the limitations would run thus: "To A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A." The heir, in this case, would not have taken any estate independently of his ancestor, any more than in the common limitation to A. and his heirs: the heir would have claimed the estate only by its descent from his ancestor, who had previously enjoyed it during his life; and the interposition of the estate of B. would have merely postponed that enjoyment by the heir, which would otherwise have been immediate. But we have seen that the very circumstance of a man's having an estate which is to go to his heir will now give him a power of alienation

(*q*) *Ante*, p. 334.

either by deed or will, and enable him altogether to defeat his heir's expectations. And, in a case like the present, the same privilege will now be enjoyed by A.; for, whilst he cannot by any means defeat the vested remainder belonging to B. for his life, he may, subject to B.'s life interest, dispose of the whole fee simple at his own discretion. A. therefore will now have in these lands, so long as B. lives, two estates, one in possession and the other in remainder. In possession A. has, with regard to B., an estate only for his own life. In remainder, expectant on the decease of B., he has, in consequence of his life interest being followed by a limitation to his heirs, a complete estate in fee simple. The right of B. to the possession, after A.'s decease, is the only thing which keeps the estate apart, and divides it, as it were, in two. If, therefore, B. should die during A.'s life, A. will be tenant for his own life with an immediate remainder to his heirs; in other words, he will be tenant to himself and his heirs, and will enjoy, without any interruption, all the privileges belonging to a tenant in fee simple.

Remainder to the heirs of the body.

By a parity of reasoning a similar result would follow, if the remainder were to the heirs of the body of A., or for an estate in tail, instead of an estate in fee simple. The limitation to the heirs of the body of A. would coalesce, as it is said, with his life estate, and give him an estate tail in remainder, expectant on the decease of B.; and if B. were to die during his lifetime, A. would become a complete tenant in tail in possession.

Any number of estates may interpose.

The example we have chosen, of an intermediate estate to B. for life, is founded on a principle evidently applicable to any number of intermediate estates, interposed between the enjoyment of the ancestor and that of his heir. Nor is it at all necessary that all these estates should be for life only; for some of them may

be larger estates, as estates in tail. For instance, suppose lands given to A. for his life, and after his decease to B. and the heirs of his body, and in default of such issue (which is the method of expressing a remainder after an estate tail), to the heirs of A. In this case A. will have an estate for life in possession, with an estate in fee simple in remainder, expectant on the determination of B.'s estate tail. An important case of this kind arose in the reign of Edward III. (*r*). Lands were given to one John de Sutton for his life, the remainder, after his decease, to John his son, and Eline, the wife of John the son, and the heirs of their bodies; and in default of such issue, to the right heirs of John the father. John the father died first; then, John and Eline entered into possession. John the son then died, and afterwards Eline his wife, without leaving any heir of her body. R., another son, and heir at law of John de Sutton, the father, then entered. And it was decided by all the Justices that he was liable to pay a *relief* (*s*) to the chief lord of the fee, on account of the descent of the lands to himself from John the father. Thorpe, who seems to have been a judge, thus explained the reason of the decision:—"You are in as heir to your father, and your brother [father ?] had the freehold before: at which time, if John his son and Eline had died [without issue] in his lifetime, he would have been tenant in fee simple."

Intermediate estate tail.

Example.

The same principles will apply where the first estate is an estate in tail, instead of an estate for life. Thus, suppose lands to be given to A. and the heirs male of his body begotten, and in default of such issue, to the heirs female of his body begotten (*t*). Here, in default of male heirs of the body of A., the heirs female will

Where the first estate is an estate tail.

(*r*) *Provost of Beverley's case*, Y. B. 40 Edw. III. 9. See 1 Prest. Estates, 304.

(*s*) *Ante*, p. 17.

(*t*) Litt. s. 719: Co. Litt. 376 b.

inherit from their ancestor the estate in tail female, which by the gift had vested in him. There is no need to repeat the estate which the ancestor enjoys for his life, and to limit the lands, in default of heirs male, *to him* and to the heirs female of his body begotten. This part of his estate in tail female has been already given to him in limiting the estate in tail male. The heirs female, being mentioned in the gift, will be supposed to take the lands as heirs, that is, by descent from their ancestor, in whom an estate in tail female must consequently be vested in his lifetime. For the same rule, founded on the same principle, will apply in every instance; and this rule is no other than the rule in *Shelley's case*, which lays it down for law, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, *either mediately or immediately*, to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor. The heir, if he should take any interest, must take as heir by descent from his ancestor: for he is not constituted, by the words of the gift or conveyance, a *purchaser* of any separate and independent estate for himself.

Rule in *Shelley's case*.

The rule, it will be observed, requires that an estate of freehold merely should be taken by the ancestor, and not necessarily an estate for the whole of his own life or in tail. In the examples we have given, the ancestor has had an estate at least for his own life, and the enjoyment of the lands by other parties has postponed the enjoyment by his heirs. But the ancestor himself, as well as his heirs, may be deprived of possession for a time; and yet an estate in fee simple or fee tail may be effectually vested in the ancestor, subject to such deprivation. For instance, suppose lands to be given to A., a widow, during her life, provided she continue a widow and unmarried, and after her marriage, to B. and his

Ancestor need not have an estate for the whole of his life.

heirs during her life, and after her decease, to her heirs. Here, A. has an estate in fee simple, subject to the remainder to B. for her life, expectant on the event of her marrying again (*u*). For to apply to this case the same reasoning as to the former ones, A. has still an estate to her and to her heirs. She has the freehold or feudal possession, and, after her decease, her heirs are to have the same. It matters not to them that a stranger may take it for a while. The terms of the gift declare that what was once enjoyed by the ancestor shall afterwards be enjoyed by the heirs of such ancestor. These very terms then make an estate in fee simple, with all its incidental powers of alienation, controlled only by the rights of B. in respect of the estate conferred on him by the same gift.

Where the ancestor takes no estate of freehold.

But if the ancestor should take no estate of freehold under the gift, but the land should be granted only to his heirs, a very different effect would be produced. In such a case a most material part of the definition of an estate in fee simple would be wanting. For an estate in fee simple is an estate given to a man and his heirs, and not merely to the heirs of a man. The ancestor, to whose heirs the lands were granted, would accordingly take no estate or interest by reason of the gift to his heirs. But the gift, if it should ever take effect, would be a future contingent estate for the person who, at the ancestor's decease, should answer the description of heir to his freehold estates. The gift would accordingly fall within the class of future estates, of which an explanation is endeavoured to be given in the next chapter (*x*).

(*u*) *Curtis* v. *Price*, 12 Ves. 89.

(*x*) The most concise account of the rule in *Shelley's case*, together with the principal distinctions which it involves, is that given by Mr. Watkins in his Essay on the Law of Descents, pp. 154 *sq.* (194, 4th ed.).

Devolution on death of reversion or remainder in fee.

A reversion or vested remainder in fee simple is alienable, during the continuance of the particular estate, not only by deed of grant (*y*), but also by will (*z*); and if the reversioner or remainderman or his heir should die intestate, the reversion or remainder would descend to the heir of the last purchaser (*a*) in the same manner as an estate in fee simple in possession (*b*). On the death after the year 1897 of a reversioner or remainderman entitled in fee simple, his estate vests, notwithstanding any testamentary disposition, in his executors or administrator in trust, subject to the payment of his debts (*c*) and testamentary or administration expenses, for the heir or devisee, as in the case of a fee simple in possession (*d*). As we have seen (*e*), an estate tail in remainder cannot, as a rule, be barred without the consent of the protector of the settlement: it is not devisable, and it descends in the same manner as an estate tail in possession (*f*).

Estates tail in remainder.

(*y*) *Ante*, pp. 31, 143, 149, 321, 325, 335.

(*z*) *Ante*, p. 238; 1 Jarm. Wills, 46 *sq.*, 653 *sq.*, 4th ed.: 48 *sq.*, 615 *sq.*, 5th ed.

(*a*) In the case of a remainder, the original grantee in remainder is of course the purchaser; see *ante*, pp. 221—223, 332.

(*b*) *Ante*, pp. 213—236. As to the descent of a reversion or remainder in fee before the Inheritance Act, 1833, see Williams on Seisin, 67 *sq.*

(*c*) A reversion or remainder in fee was made on assets for payment of the deceased owner's debts by stat. 3 & 4 Will. IV. c. 104, equally with his fee simple estates in possession; *ante*, p. 275; *post*, Part II., ch. iv.

(*d*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 214, 219, 252, 282, 311.

(*e*) *Ante*, pp. 101—103.

(*f*) *Ante*, pp. 105, 108, 220.

CHAPTER II.

OF A CONTINGENT REMAINDER.

Hitherto we have observed a very extensive power of alienation possessed by a tenant in fee simple. He might make an immediate grant, not of one estate merely, or two, but of as many as he might please, provided he ascertained the order in which his grantees were to take possession (*a*). This power of alienation, it will be observed, might in some degree render less easy the alienation of the land at a future time; for, it is plain that no sale could be made of an unincumbered estate in fee simple in the lands, unless every owner of each of these estates would concur in the sale, and convey his individual interest, whether he were the particular tenant, or the owner of any one of the estates in remainder (*b*). But if all these owners were to concur, a valid conveyance of an estate in fee simple could at any time be made. The exercise of the power of alienation in the creation of vested remainders, did not, therefore, withdraw the land for a moment from that constant liability to complete alienation, which it has been the sound policy of modern law as much as possible to encourage.

Vested remainders did not render the land inalienable.

But, great as is the power thus possessed, the law has granted to a tenant in fee simple, and to every other owner to the extent of his estate, a greater power still. For, it enables him, under certain restrictions, to grant estates to commence in interest, and not in possession merely, at a future time. So that during the period

Future estates.

(*a*) *Ante*, pp. 333—336. (*b*) See *ante*, p. 117.

which may elapse before the commencement of such estates, the land may be withdrawn from its former liability to complete alienation, and be tied up for the benefit of those who may become the owners of such future estates. The power of alienation is thus allowed to be exercised in some degree to its own destruction. For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder, and an executory interest. The former is allowed to be created by any mode of conveyance. The latter can arise only by the instrumentality of a will, or of a *use* executed, or made into an estate by the Statute of Uses. The nature of an executory interest will be explained in the next chapter. The present will be devoted to contingent remainders (*c*).

Two kinds.

Contingent remainders were anciently illegal.

The simplicity of the common law allowed of the creation of no other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder—a remainder not vested, and which never might vest,—was long regarded as illegal. Down to the reign of Henry VI. not one instance is to be found of a contingent remainder being held valid (*d*). The early authorities on the contrary are rather opposed to such a conclusion (*e*). And, at a

(*c*) Contingent remainders were abolished by stat. 7 & 8 Vict. c. 76, s. 8, but were revived by stat. 8 & 9 Vict. c. 106, s. 1, by which the former Act, so far as it abolished contingent remainders, was repealed as from the time of its taking effect.

(*d*) The reader should be informed that this assertion is grounded only on the author's researches. The general opinion appears to be in favour of the antiquity of contingent remainders. See Third Report of Real Property Commissioners, p. 23; 1 Steph. Com. 615, n. (*c*), 8th ed. And an attempt to create a contingent remainder appears in an undated deed in Mad. Form. Angl., No. 535, p. 305. See, too, Bract. fo. 13 a: Fleta, fo. 179: Britton (ed. Nichols) i. 231 and n. (*k*), and Introd. lx.—lxiii.

(*e*) Y. B. 11 Hen. IV. 74, pl. 14; in which case, a remainder to the right heirs of a man *who was dead before the remainder was limited*, was held to vest by purchase in the person who was heir. But it was said by Hankey, J., that if a gift were

later period, the authority of Littleton is express (*f*), that every remainder, which beginneth by a deed, must be *in* him to whom it is limited, before livery of seisin is made to him who is to have the immediate freehold. It appears, however, to have been adjudged, in the reign of Henry VI., that if land be given to a man for his life, with remainder to the right heirs of another *who is living*, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said that, at the time of the grant, the remainder was in a manner void (*g*). This decision ultimately prevailed. And the same case is accordingly put by Perkins, who lays it down, that if land be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there is one named in the lease (namely, A. the lessee for life), who may take immediately in the

Gift to A. for life with remainder to the right heirs of J. S.

made to one for his life, with remainder to the right heirs of a man *who was living*, the remainder would be void, because the fee ought to pass immediately to him to whom it was limited. Note, also, that in *Manderille's case* (Co. Litt. 26 b), which is an ancient case of the heir of the body taking by purchase, the ancestor was *dead* at the time of the gift. The cases of rents are not apposite, as a diversity was long taken between a grant of a rent and a conveyance of the freehold. The decision in H. 7 Hen. IV. 6 b, pl. 2, cited in *Archer's case* (1 Rep. 66 b), was on a case of a rent-charge. The authority of P. 11 Rich. II. Fitz. Abr. tit. Detinue, 46, which is cited in *Archer's case* (1 Rep. 67 a), and in *Chudleigh's case* (1 Rep. 135 b), as well as in the margin of Co. Litt. 378 a, is merely a statement by the judge of the opinion of the counsel against whom the decision was made. It runs as follows:—"Cherton to Rykhil—You think (*vous quidez*) that inasmuch as A. S. was living at the time of the remainder being limited, that if he was dead at the time of the remainder falling in, and had a right heir at the time of the remainder falling in, that the remainder would be good enough? Rykhil—Yes, Sir.—And afterwards in Trinity Term, judgment was given in favour of Wad [the opposite counsel]: *quod nota bene*."

It is curious that so much pains should have been taken by modern lawyers to explain the reasons why a remainder to the heirs of a person who takes a prior estate of freehold, should not have been held to be a contingent remainder (see Fearne C. R. 83 *sq.*), when the construction adopted (subsequently called the rule in *Shelley's case*) was decided on before contingent remainders were allowed.

(*f*) Litt. s. 721; see also M. 27 Hen. VIII. 24 a, pl. 2.

(*g*) Year Book, 9 Hen. VI. 24 a; H. 32 Hen. VI. Fitz. Abr. tit. Feoffments and Faits, 99.

beginning of the lease (*h*). This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest; and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for the maxim is *nemo est hæres viventis*, and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate which will have no existence until the decease of J. S.: if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely gives rise to the prospect of a future estate, and creates an interest of that kind which is known as a *contingent remainder* (*i*).

What becomes of the inheritance until the contingency happens.

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled, what becomes of the inheritance, in such a case as this, during the life of J. S.? A., the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine, that the remainder must vest at once or not at all, had been broken in upon; but the judges could not make up their minds also to infringe on the corresponding rule that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor. They, therefore, sagely reconciled the rule which they left standing to the contingent

A gift to the heirs of a man confers a fee simple on his heir.

(*h*) Perk. s. 52.

(*i*) 3 Rep. 20 a, in *Boraston's case*. The gift to the *heirs* of J. S. has been determined to be sufficient to confer an estate in fee simple on the person who may be his heir, without any additional limitation to the heirs of such heir; 2 Jarm. Wills, 61, 62, 4th ed. If, however, the gift be made after the 31st of December, 1833, or by the will of a testator who shall have died after that day, the land will descend, on the decease of the heir intestate, not to *his* heir, but to the next heir of J. S., in the same manner as if J. S. had been first entitled to the estate: stat. 3 & 4 Will. IV. c. 106, s. 4.

remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in abeyance, or *in gremio legis* or else *in nubibus* (*k*). Modern lawyers, however, venture to assert that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it (*l*). And when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator, unless disposed of by a residuary or specific devise (*m*).

But whatever difficulties may have upset the departure from ancient rules, the necessities of society required that future estates, to vest in unborn or unascertained persons, should under certain circumstances be allowed. And, in the time of Lord Coke, the validity of a gift in remainder to become vested on some future contingency, was well established. Since his day the doctrine of contingent remainders has gradually become settled; so that, notwithstanding the uncertainty still remaining with regard to one or two points, the whole system now presents a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles. To this desirable end the masterly treatise of Mr. Fearne on this subject (*n*) has mainly contributed.

In Lord Coke's time contingent remainders were well established.

The doctrine now settled.

Mr. Fearne's treatise

(*k*) Co. Litt. 342 b; 1 P. Wms. 515, 516; Bac. Abr. Remainder and Reversion (*c*).

(*l*) Fearne C. R. 361. See, however, 2 Prest. Abst. 100—107, where the old opinion is maintained.

(*m*) Fearne C. R. 351; *Egerton* v. *Massey*, 3 C. B., N. S. 358; Williams on Settlements, 207—210; *Re Frost*, 43 Ch. D. 246.

(*n*) Fearne's Essay on the Learning of Contingent Remainders and Executory Devises. The last edition of this work has been rendered valuable by an original view of executory interests, contained in a second volume, appended by the learned editor, Mr. Josiah William Smith.

Let us now obtain an accurate notion of what a contingent remainder is, and afterwards consider the rules which are required to be observed in its creation. We have already said that a contingent remainder is a future estate. As distinguished from an executory interest, to be hereafter spoken of, it is a future estate, which waits for and depends on the determination of the estates which precede it. But, as distinguished from a vested remainder, it is an estate in remainder, which is *not* ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine. For if any contingent remainder should, at any time, become thus ready to come into immediate possession whenever the prior estates may determine, it will then be contingent no longer, but will at once become a vested remainder (*o*). For example, suppose that a gift be made to A., a bachelor, for his life, and after the determination of that estate, by forfeiture or otherwise in his lifetime, to B. and his heirs during the life of A., and after the decease of A., to the eldest son of A., and the heirs of the body of such son. Here we have two remainders, one of which is vested, and the other contingent. The estate of B. is vested (*p*). Why? Because, though it be but a small estate, yet it is ready from the first, and, so long as it lasts, continues ready to come into possession, whenever A.'s estate may happen to determine. There may be very little doubt but that A. will commit no forfeiture, but will hold the estate as long as he lives. But, if his estate should determine the moment after the grant, or at any time *whilst B.'s estate lasts*, there is B. quite ready to take possession. B.'s estate, therefore, is vested. But the estate tail to the eldest son of A. is plainly contingent. For A., being a bachelor, has

Definition of a contingent remainder.

Example.

(*o*) See *ante*, p. 335.

(*p*) Fearne C. R. pp. 7 n. 16. 217—220. 325; *Smith* v. *Parkhurst*, 18 Vin. Abr. 413. 3 Atk. 135. 6 Bro. P. C. 353.

no son; and, if he should die without one, the estate tail in remainder will *not* be ready to come into possession immediately on the determination of the particular estates of A. and B. Indeed, in this case there will be no estate tail at all. But if A. should marry and have a son, the estate tail will at once become a vested remainder: for, so long as it lasts, that is, so long as the son or any of the son's issue may live, the estate tail is ready to come into immediate possession whenever the prior estates may determine, whether by A.'s death, or by B.'s forfeiture, supposing him to have got possession (*q*). It will be observed that here there is an estate, which, at the time of the grant, is future in interest, as well as in possession; and till the son is born, or rather till he comes of age, the lands are tied up, and placed beyond the power of complete alienation. This example of a contingent remainder is here given as by far the most usual, being that which occurs every day in the settlement of landed estates.

Principal rule for the creation of a contingent remainder.

Of the rules required for the creation of a contingent remainder the first and principal is, that the seisin, or feudal possession, must never be without an owner; and this rule is sometimes expressed as follows, that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it (*r*). The ancient law regarded the feudal possession of lands as a matter the transfer of which ought to be notorious: and it accordingly forbade the conveyance of any estate of freehold by any other means than an immediate delivery of the seisin, accompanied by words, either written or openly spoken, by which the owner of the feudal possession might at any time thereafter be known to all the neighbourhood. If, on the occasion of any feoffment, such feudal possession was not at once parted with, it

Ancient notoriety of transfer of the feudal possession.

(*q*) See *ante*, pp. 335, 336. 2 Bl. Comm. 171.
(*r*) 1 Rep. 130 a, 134 b, 138 a;

Example. a feoffment to A. to-day to hold from to-morrow.

remained for ever with the grantor. Thus a feoffment, or any other conveyance of a freehold, made to-day to A., to hold from to-morrow, would be absolutely void, as involving a contradiction. For if A. is not to have the seisin till to-morrow, it must not be given him till then (*s*). So if, on any conveyance, the feudal possession were given to accompany any estate or estates less than an estate in fee simple, the moment such estates, or the last of them, determined, such feudal possession would again revert to the grantor, in right of his old estate, and could not be again parted with by him, without a fresh conveyance of the freehold. Accordingly, suppose a feoffment to be made to A. for his life, and after his decease and one day, to B. and his heirs. Here, the moment that A.'s estate determines by his death, the feudal possession, which is not to belong to B. till one day afterwards, reverts to the feoffor, and cannot be taken out of him without a new feoffment. The consequence is, that the gift of the future estate, intended to be made to B., is absolutely void. Had it been held good, the feudal possession would have been for one day without any owner; or, in other words, there would have been a so-called remainder of an estate of freehold, without a particular estate of freehold to support it. Let us now take the case we have before referred to, of an estate to A., a bachelor, for his life, and after his decease to his eldest son in tail. In this case it is evident, that the moment A.'s estate determines by his death, his son, if living, must necessarily be ready at once to take the feudal possession in respect of his estate tail. The only case in which the feudal possession could, under such a limitation, ever be without an owner, at the time of A.'s decease, would be that of the mother being then *enceinte* of the son. In such a case the feudal possession would be evidently without an owner, until

To A. for life, and after his decease and one day, to B.

To A. for his life, and after his decease to his eldest son in tail.

(*s*) Plowd. 25 b; *Buckler's case*, 2 Rep. 55; 5 Rep. 94 b; Co. Litt. 217 a; 2 Bl. Comm. 166.

the birth of the son; and such posthumous son would accordingly lose his estate, were it not for a special provision which has been made in his favour. In the reign of William III. an Act of Parliament (*t*) was passed to enable posthumous children to take estates, as if born in their father's lifetime. And the law now considers every child *en ventre sa mère* as actually born, for the purpose of taking any benefit to which, if born, it would be entitled (*u*).

Posthumous children may take estates as if born.

As a corollary to the rule above laid down, arises another proposition, frequently itself laid down as a distinct rule, namely, that every contingent remainder must vest, or become an actual estate, during the continuance of the particular estate which supports it, or *eo instanti* that such particular estate determines; otherwise such contingent remainder will fail altogether, and can never become an actual estate at all. Thus, suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder the estate to the son is well created (*x*); for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether (*y*).

A contingent remainder must vest during the particular estate, or *eo instanti* that it determines.

Example.

(*t*) Stat. 10 & 11 Will. III. c. 16.

(*u*) *Doe* v. *Clarke*, 2 H. Bl. 339; 3 R. R. 430; *Blackburn* v. *Stables*, 2 V. & B. 367; 13 R. R. 120; *Mogg* v. *Mogg*, 1 Mer. 654; 15 R. R. 185; *Trower* v. *Butts*, 1 S. & S. 181; *Re Burrows*, 1895, 2 Ch. 497.

(*x*) 2 Prest. Abst. 148.

(*y*) *Festing* v. *Allen*, 12 M. & W. 279; 5 Hare, 573. See, however,

For the feudal possession will then immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance. An Act of 1877 (*z*), however, now saves from the operation of this rule every contingent remainder, which has been created by any instrument executed or will republished on or after the 2nd of August, 1877, and which would have been valid, if originally created as a shifting use or executory devise. For such contingent remainders shall be capable of taking effect, notwithstanding that the particular estate determine before the contingent remainder vests. We will defer the explanation of the exact point of this enactment, until we have seen what limitations may take effect as shifting uses or executory devises.

Exception made by Act of 1877.

A contingent remainder cannot be made to vest on any event which is illegal, or *contra bonos mores* (*a*). Accordingly no such remainder can be given to a child who may be hereafter born out of wedlock. But this can scarcely be said to be a rule for the creation of contingent remainders. It is rather a part of the general policy of the law in its discouragement of vice. In the reports of Lord Coke, however, a rule is laid down of which it may be useful to take some notice, namely, that the event on which a remainder is to depend must be a common possibility, and not a double possibility, or

Events on which a contingent remainder may not vest.

as to this case, *Riley* v. *Garnett*, 3 De G. & S. 629; *Browne* v. *Browne*, 3 Sm. & Giff. 568, qy.? *Re Mid Kent Railway Act*, 1856, *Ex parte Styan*, John. 387; *Holmes* v. *Prescott*, 10 Jur. N. S. 507; 12 W. R. 636; *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, L. R. 5 Eq. 399; *Perceval* v. *Perceval*, L. R. 9 Eq. 386; *Re Eddel's Trust*, L. R. 11 Eq. 559; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *Cunliffe* v. *Branker*, 3 Ch. D. 393.

(*z*) Stat. 40 & 41 Vict. c. 33; as to which see Williams on Seisin, Appx. B.

(*a*) *Blodwell* v. *Edwards*, Cro. Eliz. 509; Shepp. Touch. 128, 132; Fearne C. R. 248—249; *Egerton* v. *Brownlow*, 4 H. L. C. 1.

a possibility *on* a possibility, which the law will not allow (*b*). This rule, though professed to be founded on former precedents, is not to be found in any of the cases to which Lord Coke refers, in none of which do either of the expressions "possibility on a possibility," or "double possibility," occur. It appears to owe its origin to the mischievous scholastic logic which was then rife in our courts of law, and of which Lord Coke had so high an opinion that he deemed a knowledge of it necessary to a complete lawyer (*c*). The doctrine is indeed expressly introduced on the authority of logic:—"as the logician saith, '*potentia est duplex, remota et propinqua*'" (*d*). This logic, so soon afterwards demolished by Lord Bacon, appears to have left behind it many traces of its existence in our law; and perhaps it would be found that some of these artificial and technical rules which have most annoyed the judges of modern times (*e*) owe their origin to this antiquated system of endless distinctions without solid differences. To show how little of practical benefit could ever be derived from the distinction between a common and a double possibility, let us take one of Lord Coke's examples of each. He tells us that the chance that a man and a woman, both married *to different persons*, shall themselves marry one another, is but a common possibility (*f*). But the chance that a married man shall have a son named Geoffrey is stated to be a double or remote possibility (*g*). Whereas it is evident that the latter event is at least quite as likely to happen as the former. And if the son were to get an estate from being named Geoffrey, as in the case put, there can be very little doubt but that Geoffrey would be the name given to the first son who might be born (*h*).

Possibility on a possibility.

Scholastic logic.

Examples of common and double possibilities.

(*b*) 2 Rep. 51 a; 10 Rep. 50 b.
(*c*) Preface to Co. Litt. p. 37.
(*d*) 2 Rep. 51 a.
(*e*) Such as the rule in *Dunmore's case*, 4 Rep. 119.
(*f*) 10 Rep. 50 b; Y. B. 15 Hen. VII. 10 b. pl. 16.
(*g*) 2 Rep. 51 b.
(*h*) The true ground of the decision in the old case (10 Edw. III. 45), to which Lord Coke refers, was no doubt, as suggested by

Respect to the memory of Lord Coke has long kept on foot in our law books (*i*) the rule that a possibility on a possibility is not allowed by law in the creation of contingent remainders. But the authority of this rule has long been declining (*k*), and a very learned judge, now deceased, declared plainly that it was abolished (*l*).

But although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there are yet rules by which these remainders are restrained within due bounds, and prevented from keeping the lands, which are subject to them, for too long a period beyond the reach of alienation. These rules are closely connected with the rule introduced to effect the same object in the case of executory interests. It will therefore be more convenient to postpone their consideration until some explanation of such interests has been given.

The expectant owner of a contingent remainder may be now living.

Example.

Though a contingent remainder is an estate which, if it arise, must arise at a future time, and will then belong to some future owner, yet the contingency may be of such a kind, that the future expectant owner may be now living. For instance, suppose that a conveyance be

Mr. Preston, 1 Prest. Abst. 128, that the gift was made to Geoffrey the son, as though he were living, when in fact there was then no such person. And see Gray, Rule against Perpetuities (Boston, 1886), 81—83.

(*i*) 2 Black. Comm. 170; Fearne C. R. 252.

(*k*) See 3rd Rep. of Real. Prop. Commrs. p. 29; 1 Prest. Abst. 128, 129.

(*l*) Lord St. Leonards, in *Cole* v. *Sewell*, 2 Conn. & Laws. 344; 4 Dru. & Warr. 1, 32; affirmed, 2 H. L. C. 186. In *Re Frost*, 43 Ch. D. 246, 253, however, Lord Justice (then Mr. Justice) Kay endeavoured to support his decision by an application of the rule against double possibilities in its native simplicity. But it is respectfully submitted that the language used in this case is open to the criticism applied by Mr. Butler (Fearne C. R. 251 n., 9th ed.) to Lord Coke's remarks: and that the other ground, on which Lord Justice Kay founded his decision, is the sounder. The history of this supposed rule is admirably stated in Mr. J. C. Gray's Rule against Perpetuities (Boston, 1886), pp. 80—86, 135, 139, 140. It is there shown to be a conceit of Lord Chief Justice Popham's, which was repudiated by Lord Coke himself and by Lord Nottingham; see 1 Rolle Rep. 321; 3 Ch. Ca. 29.

made to A. for his life, and if C. be living at his decease, then to B. and his heirs. Here is a contingent remainder, of which the future expectant owner may be now living. The estate of B. is not a present vested estate, kept out of possession only by A.'s prior right thereto. But it is a future estate not to commence, either in possession or in interest, till A.'s decease. It is not such an estate as, according to our definition of a vested remainder, is always ready to come into possession whenever A.'s estate may end; for, if A. should die after C., B. or his heirs can take nothing. Still B., though he has no estate during A.'s life, has yet plainly a chance of obtaining one, in case C. should survive. This chance in law is called a *possibility;* and a possibility of this kind was long looked upon in much the same light as a condition of re-entry was regarded (*m*), having been inalienable at law, and not to be conveyed to another by deed of grant. A fine alone, before fines were abolished, could effectually have barred a contingent remainder (*n*). It might, however, have been released; that is to say, B. might, by deed of release, have given up his interest for the benefit of the reversioner, in the same manner as if the contingent remainder to him and his heirs had never been limited (*o*); for the law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen to be subsisting. A contingent remainder limited to a living person and his heirs would descend, in the case of death and intestacy pending the happening of the contingency, in like manner as a vested remainder (*p*); it was devisable by will under

A possibility.

A contingent remainder could not be conveyed by deed.

but might be released.

Would descend.

Was devisable.

(*m*) *Ante*, p. 329.

(*n*) Fearne C. R. 365; *Helps* v. *Hereford*, 2 B. & A. 242; 20 R. R. 416; *Doe* d. *Christmas* v. *Oliver*, 10 B. & C. 181; *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 A. & E. 2.

(*o*) *Lampet's case*, 10 Rep. 48 a, b; *Marks* v. *Marks*, 1 Str. 132.

(*p*) *Ante*, p. 344.

the old statutes (*q*), and is so under the present Wills Act (*r*); and in cases of death after the year 1897, it devolves upon the deceased owner's personal representatives in trust, subject to his debts (*s*), for his heir or devisee (*t*). It was also the rule in equity, that an assignment agreed for a valuable consideration to be made of a possibility should be decreed to be carried into effect (*u*). But the Real Property Act, 1845 (*x*), now enacts, that a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed (*y*).

Was assignable in equity.

Real Property Act, 1845.

Inalienable nature of a contingent remainder.

The circumstance of a contingent remainder having been so long inalienable at law, was a curious relic of the ancient feudal system. This system, the fountain of our jurisprudence as to landed property, was strongly opposed to alienation. Its policy was to unite the lord and tenant by ties of mutual interest and affection; and nothing could so effectually defeat this end as a constant change in the parties sustaining that relation. The proper method, therefore, of explaining our laws is not set out with the notion that every subject of property may be aliened at pleasure; and then to endeavour to explain why certain kinds of property cannot be aliened, or can be aliened only in some modified manner. The law itself began in another way. When, and in what manner, different kinds of property gradually became subject to different modes of alienation is the matter to

(*q*) *Jones* v. *Roe*, 3 T. R. 88; 1 R. R. 656; Fearne C. R. 366, n.

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3; *Ingilby* v. *Amcotts*, 21 Beav. 585.

(*s*) See *post*, Part II., ch. iv.

(*t*) *Ante*, pp. 29, 57, 71, 84, 85, 108, 131, 137, 183, 187, 202, 214, 219, 252, 311, 344.

(*u*) Fearne C. R. 550, 551; see cases cited, *ante*, p. 68, n. (*l*).

(*x*) Stat. 8 & 9 Vict. c. 106, s. 6.

(*y*) Every such disposition, if made by a married woman, was required to be made conformably to the provisions of the Act for the abolition of fines and recoveries; *ante*, p. 303. See now *Re Drummond and Davies' Contract*, 1891, 1 Ch. 524.

be explained; and this explanation we have endeavoured, in proceeding, as far as possible to give. But, as to such interests as remained inalienable, the reason of their being so was, that they had not been altered, but remained as they were. The statute of *Quia emptores* (*z*) expressly permitted the alienation of lands and tenements,—an alienation which usage had already authorized; and ever since this statute, the ownership of an *estate* in lands (an estate tail excepted) has involved in it an undoubted power of conferring on another person the same, or, perhaps more strictly, a similar estate. But a contingent remainder is no estate: it is merely a chance of having one: and the reason why it so long remained inalienable at law was simply because it had never been thought worth while to make it alienable.

Destruction of contingent remainders.

Liability to destruction now removed.

One of the most remarkable incidents of a contingent remainder was its liability to destruction, by the sudden determination of the particular estate upon which it depended. This liability was removed by the Real Property Act, 1845 (*a*): it was, in effect, no more than a strict application of the general rule, required to be observed in the creation of contingent remainders, that the freehold must never be left without an owner. For if, after the determination of the particular estate, the contingent remainder might still, at some future time, have become a vested estate, the freehold would, until such time, have remained undisposed of, contrary to the principles of the law before explained (*b*). Thus, suppose lands to have been given to A., a bachelor, for his life, and after his decease to his eldest son and the heirs of his body, and, in default of such issue, to B. and his heirs. In this case, A. would have had a vested estate for his

Example.

(*z*) 18 Edw. I. c. 1; *ante*, p. 72.
(*a*) Stat. 8 & 9 Vict. c. 106. s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 8, to the same effect.
(*b*) *Ante*, p. 351 *sq.*

life in possession. There would have been a contingent remainder in tail to his eldest son, which would have become a vested estate tail in such son the moment he was born, or rather begotten ; and B. would have had a vested estate in fee simple in remainder. Now, suppose that, before A. had any son, the particular estate for life belonging to A., which supported the contingent remainder to his eldest son, should suddenly have determined during A.'s life, B.'s estate would then have become an estate in fee simple in possession. There must be some owner of the freehold ; and B., being next entitled, would have taken possession. When his estate once became an estate in possession, the prior remainder to the eldest son of A. was for ever excluded. For, by the terms of the gift, if the estate of the eldest son was to come into possession at all, it must have come in before the estate of B. A forfeiture by A. of his life estate, before the birth of a son, would therefore at once have destroyed the contingent remainder by letting into possession the subsequent estate of B. (*c*).

Forfeiture of life estate.

A right of entry would have supported a contingent remainder.

The determination of the estate of A. was, however, in order to effect the destruction of the contingent remainder, required to be such a determination as would put an end to his right to the freehold or feudal possession. Thus, if A. had been forcibly ejected from the lands, his right of entry would still have been sufficient to preserve the contingent remainder ; and, if he should have died whilst so out of possession, the contingent remainder might still have taken effect For, so long as A.'s feudal possession, or his right thereto, continues, so long, in the eye of the law, does his estate last (*d*).

It is a rule of law, that "whenever a greater estate and a less coincide and meet in one and the same

(*c*) Fearne C. R. 317 : see *Doe* d. *Davies* v. *Gatacre*, 5 Bing. N. C. 609.

(*d*) Fearne C. R. 286.

person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater" (*e*). Merger. From the operation of this rule, an estate tail is preserved by the effect of the statute *De donis* (*f*). Thus, the same person may have, at the same time, an estate tail, and also the immediate remainder or reversion in fee simple expectant on the determination of such estate tail by failure of his own issue. But with regard to other estates, the larger will swallow up the smaller; and the intervention of a contingent remainder which, while contingent, is not an estate, will not prevent the application of the rule. Accordingly, if in the case above given A. should have purchased B.'s remainder in fee, and should have obtained a conveyance of it to himself, before the birth of a son, the contingent remainder to his son would have been destroyed. For in such a case, A. would have had an estate for his own life, and also, by his purchase, an immediate vested estate in fee simple in remainder expectant on his own decease; there being, therefore, no vested estate intervening, a merger would have taken place of the life estate in the remainder in fee. The possession of the estate in fee simple would have been accelerated, and would have immediately taken place, and thus a destruction would have been effected of the contingent remainder (*g*), which could never afterwards have become a vested estate: for, were it to have become vested, it must have taken possession subsequently to the remainder in fee simple; but this it could not do, both by the terms of the gift, and also by the very nature of a remainder in fee simple, which can never have a remainder after it. In the same manner the sale by A. to B. of the life estate of A., called in law a *surrender* of the life estate, before the birth of a son, would have Surrender of the life estate.

(*e*) 2 Black. Comm. 177.
(*f*) Stat. 13 Edw. I. c. 1; *ante*, p. 93.
(*g*) Fearne C. R. 340.

accelerated the possession of the remainder in fee simple by giving to B. an uninterrupted estate in fee simple in possession; and the contingent remainder would consequently have been destroyed (*h*). The same effect would have been produced by A. and B. both conveying their estates to a third person, C., before the birth of a son of A. The only estates then existing in the land would have been the life estate of A. and the remainder in fee of B. C., therefore, by acquiring both these estates, would have obtained an estate in fee simple in possession; on which no remainder could depend (*i*). But the Real Property Act, 1845 (*k*), altered the law in all these cases: for, whilst the principles of law on which they proceeded were not expressly abolished, it was nevertheless enacted (*l*), that a contingent remainder shall be, and if created before the passing of the Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. This Act, it will be observed, applies only to the three cases of forfeiture, surrender or merger of the particular estate. If, at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before (*m*), except in the cases provided for by the Act of 1877 to amend the law as to contingent remainders (*n*).

Real Property Act, 1845.

The disastrous consequences which would have resulted from the destruction of the contingent remainder, in such a case as that we have just given, were obviated

(*h*) Fearne C. R. 318.

(*i*) Fearne C. R. 322, n: *Noel* v. *Bewley*, 3 Sim. 103: *Egerton* v. *Massey*, 3 C. B., N. S. 338.

(*k*) Stat. 8 & 9 Vict. c. 106, repealing stat. 7 & 8 Vict. c. 76, s. to the same effect.

(*l*) Sect. 8.

(*m*) *Price* v. *Hall*, L. R. 5 Eq. 399: *Perceval* v. *Perceval*, L. R. 9 Eq. 386.

(*n*) Stat. 40 & 41 Vict. c. 33; *ante*, p. 354.

in practice by means of the interposition of a vested estate between the estates of A. and B. We have seen (*o*) that an estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require; but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported (*p*). And, so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land: namely, the estate of A. the tenant for life, the estate in remainder of the trustees during his life, and the estate in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees endured, that is, if they were faithful to their trust, so long as A. lived. Provision was thus made for the keeping up of the feudal possession until

Trustees to preserve contingent remainders.

(*o*) *Ante*, p. 350.
(*p*) *Mansell* v. *Mansell*, 2 P. W. 678; Fearne C. R. 326.

a son was born to take it: and the destruction of the contingent remainder in his favour was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there is no occasion for trustees to preserve them (*q*).

Trust estates.

In a former part of this volume we have spoken of equitable or trust estates (*r*). In these cases the whole estate at law belongs to trustees, who are accountable in equity to their cestui-que-trusts, the beneficial owners. As equity follows the law in the limitation of its estates, so it permits an equitable or trust estate to be disposed of by way of particular estate and remainder, in the same manner as an estate at law. Contingent remainders may also be limited of trust

(*q*) The following extract from a modern settlement, of a date previous to 1845, will explain the plan which used to be adopted. The lands were conveyed to the trustees and their heirs, to the uses declared by the settlement; by which conveyance the trustees took no permanent estate at all, as has been explained (*ante*, p. 172), but the seisin was at once transferred to those to whose use estates were limited. Some of these estates were as follows:—

To A. for life.

"To the use of the said A. "and his assigns for and during "the term of his natural life "without impeachment of waste "and from and immediately "after the determination of that "estate by forfeiture or other-"wise in the lifetime of the said "A. To the use of the said "(*trustees*) their heirs and assigns "during the life of the said A. "In trust to preserve the con-"tingent uses and estates here-"inafter limited from being "defeated or destroyed and for "that purpose to make entries "and bring actions as occasion "may require But nevertheless "to permit the said A. and his "assigns to receive the rents "issues and profits of the said "lands hereditaments and pre-"mises during his life And "from and immediately after "the decease of the said A.* To "the use of the first son of the "said A. and of the heirs of the "body of such first son lawfully "issuing and in default of such "issue To the use of the second "third fourth fifth and all and "every other son and sons of "the said A. severally succes-"sively and in remainder one "after another as they shall be "in seniority of age and priority "of birth and of the several and "respective heirs of the body "and bodies of all and every "such son and sons lawfully "issuing the elder of such sons "and the heirs of his body "issuing being always to be pre-"ferred to and to take before "the younger of such sons and "the heirs of his and their body "and respective bodies issuing "And in default of such issue" &c. Then follow the other remainders.

* To A.'s first and other sons in tail.

To trustees during his life to preserve contingent remainders.

(*r*) *Ante*, p. 177 *sq.*

Contingent remainders of trust estates were indestructible.

estates. But between such contingent remainders, and contingent remainders of estates at law, there was always this difference, that whilst the latter were destructible, the former were not (*s*). The destruction of a contingent remainder of an estate at law depended, as we have seen, on the ancient feudal rule, which required a continuous and ascertained possession of every piece of land to be vested in some freeholder. But in the case of trust estates, the feudal possession remains with the trustee (*t*). And, as the destruction of contingent remainders at law defeated, when it happened, the intention of those who created them, equity did not so far follow the law as to introduce into its system a similar destruction of contingent remainders of trust estates. It rather compelled the trustees continually to observe the intention of those whose wishes they had undertaken to execute. Accordingly, if a conveyance had been made unto *and to the use of* A. and his heirs, in trust for B. for life, and after his decease in trust for his first and other sons successively in tail,—here the whole legal estate would have been vested in A., and no act that B. could have done, nor any event which might have happened to his equitable estate, before its natural termination, could have destroyed the contingent remainder directed to be held by A. or his heirs in trust for the eldest son.

(*s*) Fearne C. R. 321.

(*t*) See *Chapman* v. *Blissett*, Ca. t. Talb. 145, 151; *Hopkins* v. *Hopkins*, Ca. t. Talb. 52 n.; *Astley* v. *Micklethwait*, 15 Ch. D. 59; *Abbiss* v. *Burney*, 17 Ch. D. 211.

CHAPTER III.

OF AN EXECUTORY INTEREST.

Executory interests arise of their own strength.

Contingent remainders are future estates, which, as we have seen (*a*), were continually liable, at common law, until they actually existed *as estates*, to be destroyed altogether; executory interests, on the other hand, are future estates, which in their nature are indestructible (*b*). They arise, when their time comes, as of their own inherent strength; they depend not for protection on any prior estates, but on the contrary, they themselves often put an end to any prior estates, which may be subsisting. It is proposed, in the present chapter, to consider the means by which these future estates may be created; and, in the next, to treat of the time fixed by the law, within which they must arise, and beyond which they cannot be made to commence. We shall then be enabled to revert to the rules, which prevent the settlement of property in perpetuity by a series of contingent remainders.

1. Executory interests may now be created in two ways—under the Statute of Uses (*c*), and by will. Executory interests created under the Statute of Uses

(*a*) *Ante*, p. 359 *sq.*

(*b*) Fearne C. R. 418. Before fines were abolished, it was a matter of doubt whether a fine would not bar an executory interest, in case of non-claim for five years after a right of entry had arisen under the executory interest. *Romilly* v. *James*, 6 Taunt. 263; see *ante*, pp. 71, n., 98. Executory interests subsequent to, or in defeazance of an estate tail, may also be barred in the same manner, and by the same means, as remainders expectant on the determination of the estate tail: Fearne C. R. 423; *Milbank* v. *Vane*, 1893, 3 Ch. 79.

(*c*) Stat. 27 Hen. VIII. c. 10.

are called *springing or shifting uses*. We have seen (*d*) that, previously to the passing of this statute, the *use* of land was under the sole jurisdiction of the Court of Chancery, as trusts were afterwards. In the exercise of this jurisdiction it would seem that the Court of Chancery, rather than disappoint the intentions of parties, gave validity to such interests of a future or executory nature, as were occasionally created in the disposition of the use (*e*). For instance, if a feoffment had been made to A. and his heirs, to the use of B. and his heirs from to-morrow, the Court would, it seems, have enforced the use in favour of B. notwithstanding that, by the rules of law, the estate of B. would have been void (*f*). Here we have an instance of an executory interest in the shape of a springing use, giving to B. a future estate arising on the morrow of its own strength, depending on no prior estate, and therefore not liable to be destroyed by its prop falling. When the Statute of Uses (*g*) was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes, which they had before possessed while subjects of the Court of Chancery. Amongst others which remained untouched, was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of lands became then, for the first time, disposable without the observance of the formalities previously required (*h*); and, amongst the dispositions allowed, were these executory interests, in which the legal seisin is shifted about from one person to another, at the mercy of the springing uses, to which the seisin has been indissolubly united by the Act of

Springing and shifting uses.

Executory uses anciently allowed by the Court of Chancery.

The Statute of Uses.

Executory uses still allowed.

(*d*) *Ante*, pp. 168—170.
(*e*) Butl. n. (*a*) to Fearne C. R. 384.
(*f*) *Ante*, p. 352.
(*g*) 27 Hen. VIII. c. 10, *ante*, p. 170.
(*h*) See *ante*, pp. 173, 197—200.

Parliament: accordingly it now happens that by means of uses, the legal seisin or possession of lands may be shifted from one person to another in an endless variety of ways. We have seen (*i*), that a conveyance to B. and his heirs to hold from to-morrow is absolutely void. But by means of shifting uses, the desired result may be accomplished; for, an estate may be conveyed to A. and his heirs, to the use of the conveying party and his heirs until to-morrow, and then to the use of B. and his heirs. A very common instance of such a shifting use occurs in an ordinary marriage settlement of lands. Supposing A. to be the settlor, the lands are then conveyed by him, by a settlement executed a day or two before the marriage, to the trustees (say B. and C. and their heirs) "to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof," to the uses agreed on; for example to the use of D., the intended husband, and his assigns for his life, and so on (*k*). Here B. and C. take no permanent estate at all, as we have already seen (*l*). A. continues as he was, a tenant in fee simple until the marriage; and if the marriage should never happen, his estate in fee simple will continue with him untouched. But, the moment the marriage takes place,—without any further thought or care of the parties,—the seisin or possession of the lands shifts away from A. to vest in D., the intended husband, for his life according to the disposition made by the settlement. After the execution of the settlement, and until the marriage takes place, the interest of all the parties, except the settlor, is future, and contingent also on the event of the marriage. But the life estate of D., the intended husband, is not an interest of the kind called a contingent remainder. For, the estate which precedes it, namely, that of A., is an estate in fee

Example :— To the use of A. and his heirs until a marriage, and after the marriage, to other uses.

(*i*) *Ante*, p. 352.
(*k*) See the form of settlement given in Part VI., *post*.
(*l*) *Ante*, pp. 173, 203—205.

simple, after which no remainder can be limited. The use to D. for his life springs up on the marriage taking place, and puts an end at once and for ever to the estate in fee simple which belonged to A. Here, then, is the destruction of one estate, and the substitution of another. The possession of A. is wrested from him by the use to D., instead of D.'s estate waiting till A.'s possession is over, as it must have done had it been merely a remainder. Another instance of the application of a shifting use occurs in those cases in which it is wished that any person who shall become entitled under the settlement shall take the name and arms of the settlor. In such a case, the intention of the settlor is enforced by means of a shifting clause, under which, if the party for the time being entitled should refuse or neglect, within a definite time, to assume the name and bear the arms, the lands will shift away from him, and vest in the person next entitled in remainder.

Another instance.

Name and arms.

From the above examples, an idea may be formed of the shifts and devices which can now be effected in settlements of land, by means of springing and shifting uses. By means of a use, a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, having until recently been destructible, would never have been made use of in modern conveyancing, but that everything would have been made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them; and, when this is the case, no art or device can prevent such estates from being what they are, contingent remainders. The only thing that could formerly be done, was to take care for their preservation, by means of trustees for that purpose. For, the law, having been acquainted with remainders long before

No limitation construed as a shifting use

which can be regarded as a remainder.

uses were introduced into it, will never construe any limitation to be a springing or shifting use, which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent (*m*).

The establishment of shifting and contingent uses occasioned great difficulties to the early lawyers, in consequence of the supposed necessity that there should, at the time of the happening of the contingency on which the use was to shift, be some person seised to the use then intended to take effect. If a conveyance were made to B. and his heirs, to the use of A. and his heirs until a marriage or other event, and afterwards to the use of C. and his heirs, it was said that the use was executed in A. and his heirs by the statute, and that as this use was co-extensive with the seisin of B., B. could have no actual seisin remaining in him. The event now happens. Who is seised to the use of C? In answer to this question it was held that the original seisin reverts back to B., and that on the event happening he becomes seised to the use of C. And to support this doctrine it was further held that meantime a possibility of seisin, or *scintilla juris*, remained vested in B. But this doctrine, though strenuously maintained in theory, was never attended to in practice. And in modern times the opinion contended for by Lord St. Leonards was generally adopted, that in fact no *scintilla* whatever remained in B., but that he was, by force of the statute, immediately divested of all estate, and that the uses thenceforward took effect as legal estates according to their limitations, by relation to the original seisin momentarily vested in B. (*n*). Finally an Act of 1860 declared the law to be in accordance with Lord St.

Scintilla juris.

Now abolished.

(*m*) Fearne C. R. 386—395, 526: *Doe* d. *Harris* v. *Howell*, 10 B. & C. 191, 197; 1 Prest. Abst. 130. See *Re Lechmere and Lloyd*, 18 Ch. D. 524; *Dean* v. *Dean*, 1891, 3 Ch. 150; *Symes* v. *Symes*, 1896, 1 Ch. 272.

(*n*) Sugd. Pow. 19.

Leonards's opinion, and gravely abolished the existence of *scintilla juris* (*o*).

Powers.

One of the most convenient and useful applications of springing uses occurs in the case of *powers*, which are methods of causing a use, with its accompanying estate, to spring up at the will of any given person (*p*): —Thus, lands may be conveyed to A. and his heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment to the use of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his *power* of appointment. Here B., though not owner of the property, has yet the power at any time, at once to dispose of it by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or by virtue of his power, he may dispose of it by his will. Such a power of appointment is evidently a privilege of great value; it is nearly as good as ownership; and it has accordingly been made to share the liabilities of ownership. Thus, under the Judgments Act, 1838, the sheriff may deliver execution under the writ of *elegit* of all hereditaments, over which a judgment debtor shall at the time of the judgment, or at any time afterwards, have

Example.

Creditors' rights.

(*o*) Stat. 23 & 24 Vict. c. 38. s. 7, which provides that where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise, by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of, or to give effect to, future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

(*p*) See Co. Litt. 271 b, n. (1), VII., 1.

any disposing power which he might, without the assent of any other person, exercise for his own benefit (*q*). And by the Bankruptcy Act, 1883, the trustee for the creditors of any person becoming bankrupt may exercise, for the benefit of his creditors, all powers (except the right of nomination to a vacant ecclesiastical benefice) which might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge (*r*). So that, in the example we have taken, the estate of C. is liable to be defeated by any judgment creditor of B. taking the lands in execution, or in the event of B.'s bankruptcy, as well as by an appointment made by B. But if B. should die before the lands have been affected by any judgment against him (*s*), and without having been bankrupt or having made any appointment by deed or will, C. will become indefeasibly entitled to the lands; which will be no longer subject to B.'s debts (*t*). If, however, B. should exercise the power by deed or will in favour of a volunteer (or person not claiming for valuable consideration (*u*)), he will be considered to have made the lands his own; and they will therefore be liable to satisfy all his debts after his death, but not until all his other property has been exhausted (*x*). Under the Land Transfer Act, 1897 (*y*), on the death after that year of any person entitled to a general power of appointment

Bankruptcy.

Devolution on the appointor's death of real

(*q*) Stat. 1 & 2 Vict. c. 110, s. 11; *ante*, p. 264. By sect. 13, judgments were also made a charge on such hereditaments: but the effect of the Act in this respect has been modified by later Acts of 1860, 1864, 1888, and 1900, in the manner explained in the chapter on Creditors' Rights: *ante*, pp. 265—269.

(*r*) Stat. 46 & 47 Vict. c. 52, ss. 44, 56; *Nichols* to *Nixey*, 29 Ch. D. 1005. Stat. 32 & 33 Vict. c. 71, ss. 15, par. (4). 25, par. (5), were to the same effect. The former Acts gave a similar power to the assignees of the bankrupt; see stats. 6 Geo. IV. c. 16, s. 77; 12 & 13 Vict. c. 106, s. 147.

(*s*) See *ante*, pp. 265—269.

(*t*) *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206.

(*u*) *Ante*, p. 78.

(*x*) Sug. Pow. 474; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *ante*, p. 214, n. (*j*); see *Williams* v. *Williams*, 1900, 1 Ch. 152, *sed quære*.

(*y*) Stat. 60 & 61 Vict. c. 65, s. 1 (2).

over real estate and having exercised the same by will, the property appointed vests in his executors or administrator in the same manner as his own real estate (*z*); but the appointee remains entitled thereto in equity in the same manner as a devisee of the testator's own estate, and has the like right of requiring a conveyance of the property, if not wanted to satisfy the testator's debts or funeral or testamentary expenses, from his personal representatives (*a*).

estate appointed by will under a general power.

Suppose, then, that B. should exercise his power, and appoint the lands by deed, to the use of D. and his heirs. In this case the execution by B. of the instrument required by the power, is the event on which the use is to spring up, and to destroy the estate already existing. The moment, therefore, that B. has duly executed his power of appointment over the use in favour of D. and his heirs, D. has an estate in fee simple in possession vested in him, by virtue of the Statute of Uses, in respect of the *use* so appointed in his favour; and the previously existing estate of C. is thenceforth completely at an end. The power of disposition exercised by B. extends, it will be observed, only to the use of the lands: and the fee simple is vested in the appointee, solely by virtue of the operation of the Statute of Uses, which always instantly annexes the legal estate to the use (*b*). If, therefore, B. were to make an appointment of the lands, in pursuance of his power, to D. and his heirs, *to the use of E. and his heirs*, D. would still have the use, which is all that B. has to dispose of: and the use to E. would be a use upon a use, which, as we have seen (*c*), is not executed, or made into a legal estate by the Statute of Uses. E., therefore, would obtain no estate at law; although the Court would in accordance with the expressed intention, consider him beneficially

Exercise of power by deed.

The power is only over the use.

(*z*) *Ante*, pp. 29, 74, 81, 131, 137, 183, 187, 202, 213, 218, 344.
(*a*) *Ante*, pp. 29, 74, 84, 131, 137, 214, 219.
(*b*) See *ante*, pp. 171—173.
(*c*) *Ante*, pp. 175—177.

entitled, and would treat him as the owner of an equitable estate in fee simple, obliging D. to hold his legal estate merely as a trustee for E. and his heirs.

The terms and formalities of the power must be complied with.

In the exercise of a power it is absolutely necessary that the terms of the power, and all the formalities required by it, should be strictly complied with. If the power should require a *deed* only, a *will* will not do: or, if a *will* only, then it cannot be exercised by a *deed* (*d*), or by any other act to take effect in the lifetime of the person exercising the power (*e*). So if the power is to be exercised by a deed attested by *two* witnesses, then a deed attested by *one* witness only will be insufficient (*f*). This strict compliance with the terms of the power was carried to a great length by the Courts of law; so much so that where a power was required to be exercised by a writing *under hand and seal attested by witnesses*, the exercise of the power was held to be invalid if the witnesses did not sign a written attestation of the signature of the deed, as well as of the sealing (*g*). The decision of this point was rather a surprise upon the profession, who had been accustomed to attest deeds by an indorsement, in the words "sealed and delivered by the within-named B. in the presence of," instead of wording the attestation, as in such a case this decision required, "*Signed*, sealed, and delivered," &c. In order, therefore, to render valid the many deeds which by this decision were rendered nugatory, an Act of Parliament (*h*) was passed by which the defect thus arising was cured, as to all deeds and instruments intended to exercise powers, which were executed prior to the 30th of July, 1814, the day of the passing of the Act. But as

Power to be exercised by writing under hand and seal, attested by witnesses.

Stat. 54 Geo. III. c. 168.

(*d*) *Marjoribanks* v. *Horenden*, 1 Drury, 11.

(*e*) Sugd. Pow. 240: 1 Chance on Powers, ch. 9, pp. 273 *sq.*: *Re Parkin*, 1892, 3 Ch. 510.

(*f*) Sugd. Pow. 207 *sq.*: 1 Chance on Powers, 331.

(*g*) *Wright* v. *Wakeford*, 4 Taunt. 213: *Doe* d. *Mansfield* v. *Peach*, 2 M. & S. 576, 15 R. R. 361: *Wright* v. *Barlow*, 3 M. & S. 512: 16 R. R. 339.

(*h*) 54 Geo. III. c. 168.

the Act had no prospective operation, the words "*signed*, sealed, and delivered" were still necessary to be used in the attestation, in all cases where the power was to be exercised by writing under *hand* and *seal*, *attested by* witnesses (*i*). It is, however, now provided by an Act of 1859, that a deed thereafter executed in the presence of and attested by *two or more* witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of the power of appointment by deed or by any instrument in writing not testamentary; notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation, or solemnity. Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing contained in the Act shall prevent the donee of a power from executing it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed; and to any such execution of a power this provision shall not extend (*k*).

New enactment.

This strict construction adopted by the Courts of law, in the case of instruments exercising powers, is in some degree counterbalanced by the practice which prevailed in the Court of Chancery to give relief in certain cases,

Equitable relief on the defective execution of powers.

(*i*) See, however, *Vincent* v. *Bishop of Sodor and Man*, 5 Ex. 682, 693, in which case the Court of Exchequer intimated that they considered the case of *Wright* v. *Wakeford* now overruled by the case of *Burdett* v. *Doe* d. *Spilsbury*, 10 Cl. & Fin. 340, 6 Man. & Gr. 386. See also *Re Rickett's Trusts*, 1 J. & H. 70, 72, affirmed, *Newton* v. *Ricketts*, 9 H. L. C. 262.

(*k*) Stat. 22 & 23 Vict. c. 35, s. 12; passed 13th Aug., 1859.

when a power had been defectively exercised,—a relief still afforded by the High Court of Justice, now that the Court of Chancery has been abolished. If the Courts of law have gone to the very limit of strictness, for the benefit of the persons entitled in default of appointment, the Court of Chancery, on the other hand, appears to have overstepped the proper boundaries of its jurisdiction in favour of the appointee (*l*). For, if the intended appointee be a purchaser from the person intending to exercise the power, or a creditor of such person, or his wife, or his child, or if the appointment be for a charitable purpose,—in any of these cases, equity will aid the defective execution of the power (*m*); in other words, the Court will compel the person in possession of the estate, who was to hold it until the power was duly exercised, to give it up on an undue execution of such power. It is certainly hard that, for want of a little caution, a purchaser should lose his purchase or a creditor his security, or that a wife or child should be unprovided for; but it may well be doubted whether it be truly equitable, for their sakes, to deprive the person in possession; for the lands were originally given to him to hold until the happening of an event (the execution of the power), which, if the power be *not* duly executed, has in fact never taken place.

Exercise of power by will.

The above remarks equally apply to the exercise of a power by will. Formerly, every execution of a power to appoint by will was obliged to be effected by a will conformed, in the number of its witnesses and other circumstances of its execution, to the requisitions of the power. But the Wills Act of 1837 (*n*) requires that all wills should be executed and attested in the same

(*l*) See 7 Ves. 506; Sugd. Pow. 532 *sq.*

(*m*) Sugd. Pow. 534, 535; 2 Chance on Powers, c. 23, p. 488 *sq*; *Lucena* v. *Lucena*, 5 Beav. 249.

(*n*) 7 Will. IV. & 1 Vict. c. 26.

uniform way (*o*); and it accordingly enacts (*p*), that no appointment made by will in exercise of any power shall be valid, unless the same be executed in the manner required by the Act: and that every will executed in the manner thereby required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Wills Act.

These powers of appointment, viewed in regard to the individuals who are to exercise them, are a species of dominion over property, quite distinct from that free right of alienation which has now become inseparably annexed to every estate, except an estate tail, to which a modified right of alienation only belongs. As alienation by means of powers of appointment was of a less ancient date than the right of alienation annexed to ownership, so it was free from some of the incumbrances by which that right was clogged. Thus a man might exercise a power of appointment in favour of himself or of his wife (*q*); although, as we have seen (*r*), a man cannot, by virtue of his ownership, directly convey to himself, and could not, previously to the year 1882, so convey to his wife. So we have seen (*s*) that a married woman could not formerly convey her estates without a *fine*, levied by her husband and herself, in which she was separately examined: and afterwards, no conveyance of her estates could be made without a deed in which her husband must have concurred, and which must have been separately acknowledged by her to be her own act and deed. But a power of appointment either by deed or will might be given to any woman; Powers of alienation unconnected with ownership differ from alienation in respect of ownership. Appointments between husband and wife. Married woman might exercise powers.

(*o*) See *ante*, p. 238.
(*p*) Sect. 10. See *Hummel* v. *Hummel*, 1898, 1 Ch. 642; *Re Price*, 1900, 1 Ch. 442; *Barretto* v. *Young*, 1900, 2 Ch. 339.
(*q*) Sugd. Pow. 471.
(*r*) *Ante*, pp. 204, 305.
(*s*) *Ante*, pp. 302—304.

and, whether given to her when married or when single, she might exercise such a power without the consent of any husband to whom she might then or thereafter be married (*t*); and the power might be exercised in favour of her husband, or of any one else (*u*). The Act of Parliament to which we have before referred (*x*), for enabling infants to make binding settlements on their marriage, with the sanction of the Court of Chancery, extends to property over which the infant has any power of appointment, unless it be expressly declared that the power shall not be exercised by an infant (*y*). But the Act provides, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any *infant tenant in tail* under the Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void (*z*).

Infants' marriage settlements.

Sic.

Ignorance of the nature powers has caused disappointment of intention.

The power to dispose of property independently of any ownership, though established for some three centuries, is at the present day frequently unknown to those to whom such a power may belong. This ignorance has often given rise to difficulties and the disappointment of intention in consequence of the execution of powers by instruments of an informal nature, particularly by wills, too often drawn by the parties themselves. A testator would, in general terms, give all his estate or all his property; and because over some of it he had only a power of appointment, and not any actual ownership, his intention till lately, was defeated. For such a general devise was no execution of his power of appointment, but operated only on the property that was his.

(*t*) *Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 577; 5 C. B. 713.

(*u*) Sugd. Pow. 471.

(*x*) *Ante*, p. 289.

(*y*) Stat. 18 & 19 Vict. c. 43, s. 1. See *Re Cardross's Settlement*, 7 Ch. D. 728.

(*z*) Sect. 2. It has been held that appointments made under the Act by infants, who are not tenants in tail, do not become void on their death under age; *Re Scott*, 1891, 1 Ch. 298.

own. He ought to have given not only all that he had, but also all of which he had any power to dispose. The Wills Act of 1837 (*a*) provided a remedy for such cases, by enacting (*b*) that a general devise of the real estate of a testator shall be construed to include any real estate which he may have power to appoint in any manner he may think proper (*c*), and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A general power of appointment now executed by a general devise.

A power of appointment may sometimes belong to a person concurrently with the ordinary power of alienation arising from the ownership of an estate in the lands. Thus lands may be limited to such uses as A. shall appoint, and in default of and until appointment to the use of A. and his heirs (*d*). And in such a case A. may dispose of the lands either by exercise of his power (*e*), or by conveyance of his estate (*f*). If he exercises his power the estate limited to him in default of appointment is thenceforth defeated and destroyed; and, on the other hand, if he conveys his estate, his power is thenceforward *extinguished*, and cannot be exercised by him in derogation of his own conveyance. So if, instead of conveying his own estate, he should convey only a partial interest, his power would be *suspended* as to such interest, although in other respects it would remain in force; that is, he may still exercise his power, so only that he do not defeat his own grant. When the same object may be accomplished either by an exercise of the power, or by a conveyance of the

A power may exist concurrently with ownership.

A power may be extinguished or suspended by a conveyance of the estate.

(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*b*) Sect. 27.

(*c*) *Clowes* v. *Audry*, 12 Beav. 604; *Re Mills*, 34 Ch. D. 186; *Re Williams*, 42 Ch. D. 93; *Re Byron's Settlement*, 1891, 3 Ch. 474; *Re Hayes*, 1900, 2 Ch. 332, 335.

(*d*) *Sir Edward Clere's case*, 6 Rep. 17 b; *Maundrell* v. *Maundrell*, 10 Ves. 246.

(*e*) *Roach* v. *Wadham*, 6 East, 289.

(*f*) *Cox* v. *Chamberlain*, 4 Ves. 631; *Wynne* v. *Griffith*, 3 Bing. 179, 10 J. B. Moore, 592, 5 B. & C. 923, 1 Russ. 283.

estate, care should be taken to express clearly by which of the two methods the instrument employed is intended to operate. Under such circumstances it is very useful first to exercise the power, and afterwards to convey the estate *by way of further assurance only*; in which case, if the power is valid and subsisting, the subsequent conveyance is of course inoperative (*g*); but if the power should by any means have been suspended or extinguished, then the conveyance takes effect.

The doctrine of powers, together with that of vested remainders, was brought into very frequent operation by the usual form of modern purchase deeds, whenever the purchaser was married on or before the 1st of January, 1834, or whenever, as sometimes happened, it was wished to render unnecessary any evidence that he was not so married. We have seen (*h*) that the dower of such women as were married on or before the 1st day of January, 1834, remained subject to the ancient law: and the inconvenience of taking a conveyance to the purchaser jointly with a trustee, for the purpose of barring dower, has also been pointed out (*i*).

Modern method of barring dower.

The modern method of effecting this object, and at the same time of conferring on the purchaser full power of disposition over the land, without the concurrence of any other person, was as follows: A general power of appointment by deed was in the first place given to the purchaser, by means of which he was entitled to dispose of the lands for any estate at any time during his life. In default of and until appointment, the land was then given to the purchaser for his life, and after the determination of his life interest by any means in his lifetime, a remainder (which, as we have seen (*k*), was vested) was limited to a trustee and his heirs during the

(*g*) *Ray* v. *Pung*. 5 Mad. 310. 5 B. & A. 561; *Doe* d. *Wigan* v. *Jones*. 10 B. & C. 159.

(*h*) *Ante*, p. 314.

(*i*) *Ante*, p. 316.

(*k*) *Ante*, pp. 350, 363.

purchaser's life. This remainder was then followed by an ultimate remainder to the heirs and assigns of the purchaser for ever, or, which is the same thing, to the purchaser, his heirs and assigns for ever (*l*). These limitations were sufficient to prevent the wife's right of dower from attaching. For the purchaser had not, at any time during his life, an estate of inheritance in possession, out of which estate only a wife could claim dower (*m*) : he had during his life only a life interest, together with a remainder in fee simple expectant on his own decease. The intermediate vested estate of the trustee prevented, during the whole of the purchaser's lifetime, any union of this life estate and remainder (*n*). The limitation to the heirs of the purchaser gave him, according to the rule in Shelley's case (*o*), all the powers of disposition incident to ownership : though subject, as we have seen (*p*), to the estate intervening between the limitation to the purchaser and that to his heirs. But the estate in the trustee lasted only during the purchaser's life, and during his life might at any time be defeated by an exercise of his power. A form of these *uses to bar dower*, as they were called, will be found in the Appendix (*q*). They will not bar the dower of wives married after the 1st of January, 1834 ; to whom dower is expressly given by the Dower Act (*r*) out of any estate of their husbands which, whether wholly equitable, or partly legal and partly equitable, is or is equal to an estate of inheritance in possession (*s*).

Uses to bar dower.

Besides these general powers of appointment, there exist also powers of a special kind. Thus the *estate*

Special powers.

(*l*) Fearne C. R. 347. n. ; Co. Litt. 379 b, n. (1).
(*m*) *Ante*, p. 314.
(*n*) *Ante*, p. 363.
(*o*) *Ante*, pp. 338—343.
(*p*) *Ante*, p. 343.
(*q*) See Appendix (A).
(*r*) Stat. 3 & 4 Will. IV. c. 105. s. 2 ; *ante*, p. 318.
(*s*) And if the deed is of a date previous to that day, even an express declaration contained in the deed that such was the intent of the uses will not be sufficient : *Fry* v. *Noble*, 20 Beav. 598. 7 De G. M. & G. 687 : *Clarke* v. *Franklin*, 4 K. & J. 266.

which is to arise on the exercise of the power of appointment may be of a certain limited duration and nature: of this an example occurs in the power of leasing which was formerly given to every tenant for life under a properly drawn settlement. We have seen (*t*) that a tenant for life cannot, by virtue of the right of alienation incident to his estate, make any disposition of the property to take effect after his decease. Such right of alienation, therefore, does not enable him to grant a lease for any certain term of years, but only contingently on his living so long. But if his life estate were limited to him in the settlement by way of *use*, as in practice was always done, a power might be conferred on him of leasing the land for any term of years, and under whatever restrictions might be thought advisable. On the exercise of this power, a use would arise to the tenant for the term of years, and with it an estate for the term granted by the lease, quite independently of the continuance of the life of the tenant for life (*u*). But if the lease attempted to be granted should have exceeded the duration authorized by the power, or in any other respect infringed on the restrictions imposed, it would have been void altogether as an exercise of the power, and might formerly have been set aside by any person having the remainder or reversion, on the decease of the tenant for life. But now, by an Act of 1849 (*x*), such a lease, if made *bonâ fide*, and if the lessee have entered thereunder, shall be considered in equity as a contract for the grant of a valid lease under the power, to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of the power; and all persons, who would have been bound by a lease lawfully granted under the power, shall be bound in equity by

Where the estate is of limited duration.

Power of leasing.

Relief against defects in leases under powers.

(*t*) *Ante*, p. 116.
(*u*) 10 Ves. 256.
(*x*) Stat. 12 & 13 Vict. c. 26, amended by stat. 13 & 14 Vict. c. 17.

such contract (*y*). But in case the reversioner is able and willing during the continuance of the lessee's possession to confirm the lease without variation (*z*), the lessee is bound to accept a confirmation accordingly (*a*). The same Act contains a further provision (*b*), valuable in the case, which sometimes happens, of a power to grant leases in possession being attempted to be exercised by a lease to commence a few days after its date. In such a case, if the lessor's estate shall continue until the day appointed for the commencement of the lease, the lease which before would have been invalid, is by the statute rendered as valid as if it had been granted on that day. Express powers of leasing, to take effect by virtue of the Statute of Uses, may still be validly created; but in practice their employment is now largely superseded in consequence of the extensive powers of leasing conferred on tenants for life by the Settled Land Act, 1882 (*c*). The enactments mentioned above (*d*) apply in the case of an intended exercise of a statutory, as well as of an express power of leasing.

Powers of sale and exchange.

Another instance of a special power occurs in the case of the power of sale and exchange, which, before the year 1883, was usually inserted in settlements of real estate (*e*). This power provided that it should be lawful for the trustees of the settlement, with the consent of the tenant for life in possession under the settlement, and sometimes also at their own discretion during the minority of the tenant in possession, to sell

(*y*) As to the power of a tenant for life to make a lease for giving effect to such a contract, see stat. 45 & 46 Vict. c. 38, s. 12; Wms. Conv. Stat. 309—311.

(*z*) As to the power of a tenant for life in reversion to confirm such leases, see stat. 45 & 46 Vict. c. 38, s. 12; Wms. Conv. Stat. 309—311.

(*a*) Stat. 13 & 14 Vict. c. 17, s. 3. Such confirmation may be by signed memorandum, or by acceptance of rent accompanied by signed memorandum (sect. 2).

(*b*) Stat. 12 & 13 Vict. c. 26, s. 4.

(*c*) *Ante*, pp. 119—121.

(*d*) Stats. 12 & 13 Vict. c. 26 ss. 2, 4; 13 & 14 Vict. c. 17.

(*e*) See *ante*, p. 117, and n. (*l*).

or exchange the settled lands, and for that purpose to revoke the uses of the settlement as to the lands sold or exchanged, and to appoint such other uses in their stead as might be necessary to effectuate the transaction proposed. But it was provided that the money to arise from any such sale, or which might be received for equality of exchange, should be laid out in the purchase of other lands; and that such lands, and also the lands which might be received in exchange, should be settled by the trustees to the then subsisting uses of the settlement. It was further provided that, until a proper purchase could be found, the money might be invested in the funds or on mortgage, and the income paid to the person who would have been entitled to the rents, if lands had been purchased and settled. The object of this power was to keep up the settlement, and at the same time to facilitate the acquisition of lands which for any reason might be more desirable, in lieu of any of the settled lands which it might be expedient to part with. The direction to lay out the money in the purchase of other lands made the money, even before it was laid out, real estate in the contemplation of equity (*f*); and though no land should ever have been purchased, the parties entitled under the settlement would have taken in equity precisely the same estates in the investments of the money, as they would have taken in any lands which might have been purchased therewith. The power given to the trustees to revoke the uses of the settlement and appoint new uses, enabled them, by virtue of the Statute of Uses, to give the purchaser of the settled property a valid estate in fee simple, provided only that the requisitions of the power were complied with. And an enactment of the year 1859 enabled the Court to relieve a *bonâ fide* purchaser under such a power, in case the tenant for life, or any other

Relief against mistaken payment by purchaser.

(*f*) *Ante*, p. 183.

party to the transaction, should by mistake have been allowed to receive for his own benefit a portion of the purchase-money, as the value of the timber or other articles (*g*). Previously to this statute the Courts of Equity had not considered themselves authorized to give relief in such a case (*h*). Since the commencement of the year 1883, the employment in settlements of express powers of sale and exchange has been rendered unnecessary, in consequence of the powers of sale and exchange given to tenants for life by the Settled Land Act, 1882 (*i*). And in drawing a settlement of land, it is now generally the practice to omit express powers of sale and exchange, as well as of leasing (*k*).

As to sales reserving minerals.

It was decided that the ordinary power of sale and exchange contained in settlements did not authorize the trustees to sell the lands with a reservation of the minerals (*l*). In consequence of this decision, which took the profession rather by surprise, an Act was passed (*m*) which confirmed all sales, exchanges, partitions and enfranchisements theretofore made, in intended exercise of any trust or power, of land with an exception or reservation of minerals, or of the minerals separately from the residue of the land (*n*). And it was provided that for the future every trustee and other person authorized to dispose of land by way of sale, exchange, partition or enfranchisement, might, with the sanction of the Court of Chancery, now represented by the Chancery Division of the High Court, dispose of the land without the minerals, or of the minerals without the land, unless forbidden so to do by the instrument

(*g*) Stat. 22 & 23 Vict. c. 35, s. 13.
(*h*) *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418.
(*i*) *Ante*, pp. 118. 121.
(*k*) See Wms. Conv. Stat. 297. 515. 517; and the form of settlement given in Part VI., *post*; *ante*, p. 118.
(*l*) *Buckley* v. *Howell*, 29 Beav. 546.
(*m*) Stat. 25 & 26 Vict. c. 108.
(*n*) Sect. 1.

creating the trust or power (*o*). A sale, exchange, partition or mining lease may be made, under the powers conferred by the Settled Land Act, 1882 (*p*), either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers and privileges connected with mining purposes in relation to the settled land, or any part thereof, or any other land (*q*). And an occupation or a building lease may be well granted, under the powers given by the same Act, of the surface of the settled land, reserving the mines and minerals thereunder (*r*).

When the objects are limited.

Other kinds of special powers occur where the *persons* who are to take estates under the powers are limited to a certain class. Powers to jointure a wife, and to appoint estates amongst children, are the most useful powers of this nature.

Powers may be extinguished by release.

Powers may, generally speaking, be destroyed or extinguished by deed of release made by the donee or owner of the power to any person having any estate of freehold in land; "for it would be strange and unreasonable that a thing, which is created by the act of the parties, should not by their act, with their mutual consent be dissolved again" (*s*). And it is now expressly enacted that a person to whom any power, whether coupled with an interest or not, is given may by deed

(*o*) Stat. 25 & 26 Vict. c. 108, s. 2, now replaced by 56 & 57 Vict. c. 53, s. 44, amended by 57 Vict. c. 10, s. 3.

(*p*) Stat. 45 & 46 Vict. c. 38; see *ante*, pp. 119, 121.

(*q*) Sect. 17, sub-s. 1. By sub-s. 2, an exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

(*r*) *Re Gladstone*, 1900, 2 Ch. 101. So also under an express power of leasing in a settlement authorizing occupation, building and mining leases; *Re Rutland's Settled Estates*, *ib.* 206.

(*s*) *Albany's case*, 1 Rep. 110 b, 113 a; *Smith* v. *Death*, 5 Mad. 371, 21 R. R. 314; *Horner* v. *Swann*, T. & R. 430.

release or contract not to exercise the power (*t*). The exceptions to this rule appear to be all reducible to the simple principle, that if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release (*u*). By the Fines and Recoveries Act, 1833 (*x*), it is provided (*y*), that every married woman may, with the concurrence of her husband, by deed to be acknowledged by her as her act and deed according to the provisions of the Act (*z*), release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure, or any money subject to be invested in the purchase of lands (*a*), or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole (*b*). A power, whether coupled with an interest or not, may now be effectually disclaimed (*c*) by deed (*d*). The above remarks as to the extinguishment of powers are not intended to apply to statutory powers, which are regulated by the terms of the statute creating them. Thus we have seen that the powers given to a tenant for life by the Settled Land Act, 1882, are not capable of release; and a contract by a tenant for life not to exercise any of his powers under that Act is void (*e*). Our notice of powers must here conclude. On a subject so vast, much must necessarily remain unsaid. The treatises of Sir Edward Sugden (afterwards Lord St. Leonards) and Mr. Justice Farwell will supply the student with all the further information he may require.

Exceptions.

Release of powers by married women.

Disclaimer of a power.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 52. See Wms. Conv. Stat. 226.

(*u*) See 2 Chance on Powers, 584; Wms. Conv. Stat. 227.

(*x*) Stat. 3 & 4 Will. IV. c. 74.

(*y*) Sect. 77.

(*z*) See *ante*, p. 303.

(*a*) See *ante*, p. 183.

(*b*) As to the capacity of married women to release or extinguish powers since the commencement of the Married Women's Property Act, 1882, see Wms. Conv. Stat. 383—386.

(*c*) See *ante*, p. 84.

(*d*) Stat. 45 & 46 Vict. c. 39, s. 6. See Wms. Conv. Stat. 280, 281.

(*e*) *Ante*, pp. 123, 124.

Creation of executory interests by will.

2. An executory interest may also be created by will. Before the passing of the Statute of Uses (*f*), wills were employed only in the devising of uses, under the protection of the Court of Chancery, except in some few cities and boroughs where the legal estate in lands might be devised by special custom (*g*). In giving effect to these customary devises, the Courts in very early times showed great indulgence to testators (*h*); and perhaps the first instance of the creation of an executory interest occurred in directions given by testators that their executors should sell their tenements. Such directions were allowed by law in customary devises (*i*); and in such cases it is evident that the sale by the executors operated as the execution of a power to dispose of that in which they themselves had no kind of ownership. For executors, as such, had nothing to do with freeholds. Here, therefore, was a future estate or executory interest created: the fee simple was shifted away from the heir of the testator, to whom it had descended, and became vested in the purchaser, on the event of the sale of the tenement to him. The Court of Chancery also, in permitting the devise of the *use* of such lands as were not themselves devisable, allowed of the creation of executory interests by will, as well as in transactions between living persons (*k*). And in particular directions given by persons having others seised of lands to their use, that

Directions that executors should sell lands devisable by custom.

Directions that executors should

(*f*) 27 Hen. VIII. c. 10.

(*g*) *Ante*, p. 73.

(*h*) 30 Ass. 183 a: Litt. s. 586.

(*i*) Year Book, 9 Hen. VI. 24 b, Babington:—"La nature de devis ou terres sont devisables est, que on peut deviser que la terre sera vendu par executors, et ceo est bon, come est dit adevant, et est marveilous ley de raison: mes ceo est le nature d'un devis, et devise ad este use tont temps en tiel forme; et issint on aura loyalment franktenement de cesty qui n'avoit rien, et en meme le maniere come on aura *fire from flint*, et uncore nul *fire* est deins le *flint*: et ceo est pour performer le darrein volonte de le devisor." Paston.—"Une devis est marveilous en lui meme quand il peut prendre effect; car si on devise en Londres que ses executors vendront ses terres, et devie seisi; son heir est eins par descent, et encore par le vend des executors il sera ouste." See also Litt. s. 169.

(*k*) Perk. ss. 507, 528.

such lands should be sold by their executors, were not only permitted by the Court of Chancery, but were also recognized by the legislature. For, by a statute of the reign of Henry VIII. (*l*) of a date previous to the Statute of Uses, it is provided, that in such cases, where part of the executors refuse to take the administration of the will, and the residue accept the charge of the same will, then all bargains and sales of the lands so willed to be sold by the executors, made by him or them only of the said executors that so doth accept the charge of the will, shall be as effectual as if all the residue of the executors so refusing, had joined with him or them in the making of the bargain and sale.

sell lands of which others were seised to the testator's use.

But, as we have seen (*m*), the passing of the Statute of Uses abolished for a time all wills of uses, until the Statute of Wills (*n*) restored them. When wills were restored, the uses, of which they had been accustomed to dispose, had been all turned into estates at law; and such estates then generally came, for the first time, within the operation of testamentary instruments. Under these circumstances, the Courts of law in interpreting wills, adopted the same lenient construction which had formerly been employed by themselves in the interpretation of customary devises, and also by the Court of Chancery in the construction of devises of the ancient use. The statute which, in the case of wills of *uses*, had given validity to sales made by the executors accepting the charge of the will, was extended, in its construction, to directions (now authorized to be made) for the sale by the executors of the *legal estate*, and also to cases where the legal estate was devised to the executors to be sold (*o*). Future estates at law were also allowed to be created by will, and were invested

The Statute of Uses.

(*l*) Stat. 21 Hen. VIII. c. 4.
(*m*) *Ante*, pp. 71, 171, 237.
(*n*) 32 Hen. VIII. c. 1.
(*o*) *Banifant* v. *Greenfield*, Cro. Eliz. 80; Co. Litt. 113 a; see *Mackintosh* v. *Barber*, 1 Bing. 50.

with the same important attribute of indestructibility which belongs to all executory interests. These future estates were called *executory devises*, and in some respects they appear to have been more favourably interpreted than shifting uses contained in deeds (*p*); though, generally speaking, their attributes are the same. To take a common instance:—a man may, by his will, devise lands to his son A., an infant, and his heirs, but in case A. should die under the age of twenty-one years, then to B. and his heirs. In this case A. has an estate in fee simple in possession, subject to an executory interest in favour of B. If A. should not die under age, his estate in fee simple will continue with him unimpaired. But if he should die under that age, nothing can prevent the estate of B. from immediately arising, and coming into possession, and displacing for ever the estate of A. and his heirs. Precisely the same effect might have been produced by a conveyance to uses. A conveyance to C. and his heirs, to the use of A. and his heirs, but in case A. should die under age, then to the use of B. and his heirs, would have effected the same result. Not so, however, a direct conveyance independently of the Statute of Uses. A conveyance directly to A. and his heirs would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that, if A. should die under age, the land should belong to B. and his heirs, would fail to operate on the legal seisin; and the estate in fee

Executory devises.

Example.

(*p*) In the cases of *Adams* v. *Savage* (2 Lord Raym. 855; 2 Salk. 679), and *Rawley* v. *Holland* (22 Vin. Abr. 189, pl. 11), limitations which would have been valid in a will by way of executory devise were held to be void in a deed by way of shifting or springing use. But these cases have been doubted by Mr. Serjeant Hill and Mr. Sanders (1 Saund. Uses, 142, 143; 148, 5th ed., and denied to be law by Mr. Butler (note (*y*) to Fearne C. R. p. 41). Mr. Preston also lays down a doctrine opposed to the above cases (1 Prest. Abst. 114, 130, 131). Sir Edward Sugden, however, supports these cases, and seems sufficiently to answer Mr. Butler's objection (Sugd. Gilb. Uses, 35, n.).

simple of A. would, in case of his decease under age, still descend, without any interruption, to his heir at law.

Difference between a contingent remainder and an executory devise.

A good illustration of the difference between a contingent remainder and an executory devise occurs in the case of a devise of lands by will to A. for life, with remainder in fee to such son of B. as shall first attain the age of twenty-one years. In this case the limitation to the son of B. is either a contingent remainder or an executory devise, according as A., the tenant for life, may or may not survive the testator. If A. should survive the testator, there will be an estate of freehold subsisting in the premises, for the determination of which the limitation to the son of B. must wait, before it can take effect in possession. This limitation is, therefore, a remainder; and, as it depends on the contingency of B. having a son who may attain twenty-one, it is a contingent remainder. But if A. should die in the lifetime of the testator, the will would start, on the testator's death, with a simple limitation to such son of B. as shall first attain the age of twenty-one years. This limitation has not to wait for the determination of any prior estate of freehold; but it arises of itself on the event of a son of B. attaining the age of twenty-one years; and it displaces, when it takes effect, the estate in fee simple, which, not being otherwise disposed of, descends, immediately on the death of the testator, to his heir at law. It is, therefore, in this case, not a contingent remainder, but an executory devise. Under the law as it stood before the Act of 1877 amending the law as to contingent remainders (*q*), if A. survived the testator, but died before any son of B. attained twenty-one the limitation failed for want of an estate of freehold to support it: whereas if A. died in the lifetime of the testator, it was not liable to any failure.

(*q*) Stat. 40 & 41 Vict. c. 33; *ante*, p. 354.

It was to remedy the hardship occasioned by the failure of such a limitation as this, when it occurred in the shape of a contingent remainder, that the Act above mentioned was framed.

Alienation of executory interests.

The alienation of an executory interest, before its becoming an actually vested estate, was formerly subject to the same rules as governed the alienation of contingent remainders (*r*). But by the Real Property Act, 1845, all executory interests may now be disposed of by deed (*s*). Accordingly, to take our previous example, if a man should leave lands, by his will, to A. and his heirs, but in case A. should die under age, then to B. and his heirs,—B. may by deed, during A.'s minority, dispose of his expectancy to another person, who, should A. die under age, will at once stand in the place of B. and obtain the fee simple. But before the Act, this could not have been done; B. might indeed have sold his expectancy; but *after* the event (the decease of A. under age), B. must have executed a conveyance of the legal estate to the purchaser; for, until the event, B. had no *estate* to convey (*t*). An executory interest given to an ascertained person and his heirs will devolve on his death in like manner as a contingent remainder limited in fee to an ascertained person (*u*).

Example.

Devolution on death.

Estates arising by force of

Similar to an estate arising by executory devise, is an estate which arises solely by the force of a statute,

(*r*) *Ante*, p. 357.

Sale or mortgage for payment of debts.

(*s*) Stat. 8 & 9 Vict. c. 106, s. 6, repealing stat. 7 & 8 Vict. s. 76, s. 5. In order to facilitate the payment of debts out of real estate, it was provided, by stats. 11 Geo. IV. and 1 Will. IV. c. 47, s. 12, and 2 & 3 Vict. c. 60, that when lands are by law, or by the will of their owner, liable to the payment of his debts, and are by the will vested in any person by way of executory devise, the first executory devisee, even though an infant, may convey the whole fee simple in order to carry into effect any decree for the sale or mortgage of the estate for payment of such debts. And this provision, so far as it relates to a sale, was extended to the case of the land having descended to the heir, subject to an executory devise over in favour of a person or persons not existing or not ascertained: stat. 11 & 12 Vict. c. 87. See *ante*, p. 123, n. (*u*).

(*t*) *Ante*, p. 357.

(*u*) *Ante*, pp. 357, 358.

upon the execution of some statutory power. This occurs whenever an estate in land is transferred by any person by means of an authority conferred upon him by some statute, and not by means of the right of alienation incident to an estate in land or of a power given to him under the Statute of Uses or by a will. For example, by the Settled Land Act, 1882, a tenant for life under a settlement is empowered to convey the settled land by deed for all the estate and interest, which is the subject of the settlement, or for any less estate or interest (*x*), as may be required for carrying into effect the powers of leasing, sale, exchange, partition and other powers given by that Act (*y*). He may thus convey the whole legal estate in fee simple in the settled land, if comprised in the settlement, even though he himself should have merely an equitable estate for life (*z*). When a tenant for life exercises his power of conveyance under this Act, the legal estate in the

Statute on execution of a statutory power.

Conveyance by tenant for life under Settled Land Act, 1882.

(*x*) Subject, however, to and with the exception of (i.) all estates, interests and charges having priority to the settlement; and (ii.) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life. See *Re Keck & Hart*, 1898, 1 Ch. 617; *Re Du Cane & Nettlefold*, 1898, 2 Ch. 96; *Re Mundy & Roper's Contract*, 1899, 1 Ch. 275. An example of the first exception occurs where lands have been mortgaged and afterwards settled on one for life with remainder over: here the mortgagee's estate cannot be displaced by the tenant for life selling or leasing the lands under his statutory powers. The second exception may be instanced by the case of a term limited by the settlement to raise portions for younger children, and mortgaged to secure the repayment of money actually raised before the date of the deed exercising the statutory power. The third exception will arise where the tenant for life has granted a lease of the settled lands, either by virtue of his estate or of an express or the statutory power, and afterwards sells the lands under the Settled Land Acts. See *ante*, p. 121; *post*, Part IV., ch. 1 & 2; Part VI.

(*y*) Stat. 45 & 46 Vict. c. 38, s. 20. See *ante*, pp. 118—124.

(*z*) See *ante*, p. 185.

settled land is, by the force of the statute, taken away from the persons, in whom it has been previously vested, and conveyed to the lessee, purchaser or other person, to the extent specified in the deed, by which the lease, purchase or other transaction is carried out. Thus the estate limited by such a deed arises solely by virtue of the Act, which has empowered the tenant for life to convey. The operation of such a statutory power is therefore different from that of a power to appoint the *use* of land, which takes effect under the Statute of Uses. So that if land be conveyed under a statutory power to A. and his heirs to the use of B. and his heirs, B., not A., will take the fee simple at law (*a*). Another example of estates arising by force of statute upon the execution of a statutory authority is afforded by the effect of a declaration made by a person appointing new trustees under the Trustee Act, 1893, that the estate in any land, which is subject to the trust, shall vest in the persons who will thenceforward be the trustees (*b*).

Declaration vesting land in future trustees.

(*a*) *Ante*, pp. 173, 373; Sug. Pow. 45, 146, 196—198.

(*b*) See *ante*, p. 192.

CHAPTER IV.

OF REMOTENESS OF LIMITATION.

Limitations may be void for remoteness.

The limitation of estates to arise at a future time by way of shifting use or executory devise must conform to the requirements of a rule, known as the rule against perpetuities; or else it will be void for remoteness. This rule is founded on a general principle of policy guiding the judges, that all contrivances shall be void, which tend to create a perpetuity, or to place property for ever out of reach of the exercise of the power of alienation (*a*). This principle appears to have been first applied after it had become well settled that an estate tail might be barred by a common recovery, as a reason for holding that any contrivance to restrain a tenant in tail from suffering a recovery shall be of no effect (*b*). When the law came to recognize as valid the limitation of estates in remainder to unborn children, and further to admit the creation of future estates by way of shifting use and executory devise (*c*), it was seen that such devices, unless restrained within due bounds, might pave the way to perpetual settlement of land; and the same principle of policy was again invoked (*d*). In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions. Such estates

Perpetuity.

(*a*) *Nottingham*, C., *Howard* v. *Duke of Norfolk*, 2 Swanst. 454, 460; 3 Cha. Ca. 17, 20, 25, 31—36; 2 P. W. 688; *London & South-Western Railway Co.* v. *Gomm*, 20 Ch. D. 562.

(*b*) 1 Rep. 84 a, 88 a, 131 b; 6 Rep. 40 a; 10 Rep. 42 b; Cro. Jac. 696—698; *ante*, p. 97, and note (*p*).

(*c*) *Ante*, pp. 346—349, 367, 388—391.

(*d*) See Cro. Jac. 590—593; 2 Swanst. 460—468; 3 Ch. Ca. 17, 20, 25, 31—36; 12 Mod. 287.

were allowed to take effect, at first, within the compass of an existing life (*e*); then within a *reasonable* time after (*f*). This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument, by which the executory estate was conferred (*g*). After this, it was held that any number of existing lives might be taken (*h*). Finally, it was settled that the time allowed after the duration of existing lives should be a term of twenty-one years, independently of the minority of any person, whether entitled or not; with the possible addition of the period of gestation, but only where the gestation actually exists (*i*).

The Rule against perpetuities.

The rule so settled is what is generally called "the rule against perpetuities;" and it will be convenient so to refer to it. It requires every future estate limited to arise by way of shifting use or executory devise to be such as must necessarily arise within the compass of existing lives and twenty-one years after, with the possible addition of the period of gestation, in the case of some person entitled being a posthumous child. But if no lives are fixed on, then the term of twenty-one years only is allowed (*k*). And every executory estate, which might, in any event, transgress the limits so fixed, will from its commencement be absolutely void.

Example.

For instance, a gift by way of shifting use or executory devise to the first son of A., a bachelor, who shall attain the age of twenty-four years, is void for remoteness (*l*). For if A. were to die, leaving a son a few months old,

(*e*) *Howard* v. *Duke of Norfolk*, 3 Ch. Ca. 11; 2 Swanst. 454.

(*f*) *Marks* v. *Marks*, 10 Mod. 419.

(*g*) *Stephens* v. *Stephens*, Ca. t. Talb. 228.

(*h*) *Thellusson* v. *Woodford*, 4 Ves. 227, 11 Ves. 112.

(*i*) *Cadell* v. *Palmer*, 7 Bligh, N. S. 202.

(*k*) Lewis on Perpetuities, 172; 1 Jarm. Wills, 216, 5th ed.

(*l*) *Newman* v. *Newman*, 10 Sim. 51; *Griffith* v. *Blunt*, 4 Beav. 248; 1 Jarm. Wills, 226, 227, 5th ed. In the case of an executory gift by *will*, however,

the estate of the son would arise, under such a gift, at a time exceeding the period of twenty-one years from the expiration of the life of A., which, in this case, is the life fixed on. But a gift to the first son of A. who shall attain the age of twenty-one years will be valid, as necessarily falling within the allowed period. When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity (*m*).

Exception where preceded by an estate tail.

Executory limitations contained in instruments coming into operation after the year 1882 are subject to a further restriction imposed by the Conveyancing Act, 1882 (*n*); in which it is enacted that, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation

Executory limitations to take effect on failure of issue.

the time within which the estate given must arise, is computed from the death of the testator, to whom knowledge of the circumstances then existing is imputed. So that a gift, which would have been void, if the testator had died immediately after making his will, may be valid at his death. Thus in the example given in the text, if the gift were made by will, and A. were to die before the testator, leaving a son, it would be valid; for the person to take would have been ascertained at the testator's death, and the estate given to him must in such case necessarily arise within a life in being, viz. his own. And the gift would also be valid, if a son of A. had attained twenty-four before the testator's death, though A. survived the testator; 1 Jarm. Wills, 216, 5th ed.; *Picken* v. *Matthews*, 10 Ch. D. 264.

(*m*) Butler's note (*h*) to Fearne C. R. 562; Lewis on Perpetuities, 669. See *ante*, p. 366, n. (*h*); *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

(*n*) Stat. 45 & 46 Vict. c. 39, s. 10. See Wms. Conv. Stat. 288.

over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

Restriction on accumulation.

In addition to these limits, a restriction is imposed by an Act of George III. (*o*) on attempts to accumulate the income of property for the benefit of some future owner. This Act was occasioned by the extraordinary will of Mr. Thellusson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren and great-grandchildren *who were living at the time of his death*, for the benefit of some future descendants to be living at the decease of the survivor (*p*); thus keeping strictly within the rule which allowed any number of existing lives to be taken at the period for an executory interest. To prevent the repetition of such a cruel absurdity, the Act forbids the accumulation of income for any longer term than the life of the grantor or settlor, *or* twenty-one years from the death of any such grantor, settlor, devisor or testator, *or* during the minority of any person living, or in *ventre sa mère* at the death of the grantor, devisor, or testator, *or* during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income directed so to be accumulated (*q*). But the Act does not extend (*r*) to any provision for payment of debts, or for raising portions for children (*s*), or to any direction

Mr. Thellusson's will.

Stat. 39 & 40 Geo. III. c. 98.

(*o*) Stat. 39 & 40 Geo. III. c. 98: Fearne C. R. 538, n. (*x*).

(*p*) 4 Ves. 227; Fearne C. R. 436, n.

(*q*) *Wilson* v. *Wilson*, 1 Sim. N. S. 288.

(*r*) Sect. 2.

(*s*) See *Halford* v. *Stains*, 16 Sim. 488, 496; *Bacon* v. *Procter*, T. & R. 31; *Bateman* v. *Hodgkin*, 10 Beav. 426; *Barrington* v. *Liddell*, 2 De G. M. & G. 480;

touching the produce of timber or wood. Nor does it apply to a trust to expend part of the income of a landed estate in maintaining the property in good repair (*t*). Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the Act, but void so far as this time may be exceeded (*u*). And if the direction to accumulate should exceed the limits allowed by law for the creation of executory interests, it will be void altogether, independently of the above Act (*x*). By an Act of 1892 (*y*), the accumulation of income for the purchase of land is prohibited for any longer period than during the minority or respective minorities of any person or persons, who under the instrument directing the accumulation would, for the time being, if of full age, be entitled to receive the income so directed to be accumulated.

Rules for creation of contingent remainders.

Rule 1.

Let us now return to the rules governing the creation of contingent remainders. We have considered the first of these, that the freehold must never be without an owner, or that every contingent remainder must be supported by a particular estate of freehold (*z*). And it will be remembered that, in consequence of this rule, every contingent remainder must vest during the continuance or immediately on the termination of the particular estate, or it will fail altogether (*a*). Also, that an Act of 1877 now saves from this consequence of the rule every contingent remainder created after the Act, which would have been valid if originally created

Edwards v. *Tuck*, 3 De G. M. & G. 40.

(*t*) *Vine* v. *Raleigh*, 1891, 2 Ch. 13.

(*u*) 1 Jarm. Wills, 275, 5th ed. See *Re Lady Rosslyn's Trust*, 16 Sim. 391; *Ralph* v. *Carrick*, 5 Ch. D. 984, 997, 998; *Re Travis*, 1900, 2 Ch. 541.

(*x*) *Southampton* v. *Hertford*, 2 V. & B. 54, 13 R. R. 18; *Ker* v. *Dungannon*, 1 Dr. & War. 509; *Curtis* v. *Lukin*, 5 Beav. 147; *Broughton* v. *James*, 1 Coll. 26; *Searisbrick* v. *Skelmersdale*, 17 Sim. 187; *Turvin* v. *Newcome*, 3 K. & J. 16.

(*y*) Stat. 55 & 56 Vict. c. 58.

(*z*) *Ante*, p. 351.

(*a*) *Ante*, p. 353.

as a shifting use or executory devise (*b*). We have now seen, however, that for a limitation to be valid as a shifting use or executory devise, it must conform to the rule against perpetuities (*c*). No contingent remainder will therefore be preserved by this Act, unless it be such as must necessarily vest within the duration of existing lives and twenty-one years after. Thus, if land be granted after 1877 to A., a bachelor, for life, and after his death to his first son, who shall attain the age of twenty-four years, the gift to A.'s son is good as a contingent remainder, and may take effect if a son of A. attain twenty-four in A.'s lifetime (*d*). But if A. die before any son of his attain twenty-four, the contingent remainder to A.'s son will fail altogether, by the common law rule, as not having vested before or at the termination of the particular estate. And it will not be saved by the Act of 1877 (*e*); because as we have seen (*f*), it would not have been valid, if originally created as a shifting use or executory devise.

Perpetuity in the case of contingent remainders.

The liability of contingent remainders to be destroyed by the act of the tenant, on whose particular estate they depended, was a great safeguard against the creation of a perpetuity (*g*). But if there had been no check but this, a perpetual settlement might possibly have been made, after the introduction of trustees to preserve contingent remainders (*h*), by giving life estates successively in remainder to successive generations of children. But it seems to have been understood by those concerned in drawing settlements of land in the modern form generally adopted after the Restoration (*i*), that estates given to unborn children should be confined to such as must be ascertained within the

(*b*) *Ante*, p. 354.
(*c*) *Ante*, p. 396.
(*d*) *Ante*, p. 353.
(*e*) *Ante*, p. 354.
(*f*) *Ante*, p. 397.
(*g*) *Ante*, pp. 359, 395; see 1 Rep. 120, 131 b.
(*h*) *Ante*, p. 363.
(*i*) *Ante*, p. 112.

compass of existing lives (*k*). For the conveyancing practice established with regard to such settlements was (as it still is) to limit the land to an intended husband, or eldest son coming of age, for life, with remainder to *his* unborn sons successively in tail (*l*). And attempts to confer successive life estates on successive generations of unborn children were held to violate the principle of policy mentioned above (*m*). After a time, the restraint imposed on the creation of successive contingent remainders came to be generally defined in a sort of working rule adopted by conveyancers and quoted by judges, that an estate given to an unborn person for life cannot be followed by any estate to any child of such unborn person. And it was allowed on all hands that, if such a limitation were made, the estate given to the child of the unborn person would be void (*n*). The reason assigned for this, however, was not always the same; for the origin of the rule was attributed sometimes to the general policy of the law restraining attempts to create a perpetuity, sometimes to the old doctrine which prohibited double possibilities (*o*). This rule gained authority from general use (*p*). After the period allowed for the creation of executory interests had been extended to an independent term of twenty-one years after the duration of existing lives (*q*), it was much debated,

(*k*) *Ante*, p. 396.

(*l*) See the books cited in note (*i*) to p. 117, *ante*; Fearne C. R. 502.

(*m*) *Ante*, p. 395; *Humberston* v. *Humberston*, 1 P. W. 332, 1 Atk. 593; *Seaward* v. *Willock*, 5 East. 198, 205.

(*n*) *Marlborough* v. *Godolphin*, 1 Eden, 415, 416; 2 Cases and Opinions, 432—441; *Hay* v. *Earl of Coventry*, 3 T. R. 86, 1 R. R. 652; *Brudenell* v. *Elwes*, 1 East, 452, 6 R. R. 310; Fearne's Posthuma, 215; Fearne C. R. 502, 565, Butl. note; 2 Prest. Abst. 114; Sug. Pow. 393.

(*o*) *Ante*, p. 355; Fearne C. R. 251, n., 502, 565, n.; Co. Litt. 271 b, n. (1), vii. 2; Vaizey, L. Q. R. vi. 419. Historically, the former explanation seems to be correct: Gray, Rule against Perpetuities (Boston, 1886), pp. 135, 137, 139, 140, 206—208.

(*p*) *Cole* v. *Sewell*, 2 H. L. C. 186; *Monypenny* v. *Dering*, 2 De G. M. & G. 145, 170; Sugden on Property, 120; Sugd. Real Prop. Stat. 285, n. (*a*), 1st ed., 274, n. (*a*), 2nd ed.; 1 Jarm. Wills, 221, 1st ed., 251, 4th ed.; Wms. Real Prop. 212, 1st ed., 276, 13th ed.

(*q*) *Ante*, p. 396.

whether the rule so applied to contingent remainders should or should not be considered as merely an instance of the settled rule against perpetuities (*r*). But limitations likely to raise this question were eschewed in practice (*s*). The point first came before the Court in 1889, when the judges were apparently not inclined to sanction any possible extension of the time of settlement for the sake of introducing a uniform rule. Accordingly, the working rule of conveyancers was declared to be an independent rule of law; and a remainder limited to the child of an unborn person, after a life estate to the unborn parent, was held to be void, notwithstanding that the gift in remainder had been expressly confined to such child of the unborn parent as should be born within the compass of lives existing at the time of the gift (*t*). The creation of contingent remainders of legal estates is therefore subject to the rule, that an estate cannot be well limited, in remainder after an estate given to an unborn person for life, to any child of such unborn person (*u*).

Rule 2.

Cy-près doctrine.

The above rule is, however, subject to some modification, when the gift is made by will. For in the case of a gift *by will* to the unborn son of some living person for his life, and after the decease of such unborn son, to *his* sons in tail, the Courts of law have been so indulgent

(*r*) See Lewis on Perpetuities, 408 *sq.*; Williams on Real Property, 211, 212, 1st ed.: 227, 406, 3rd ed.: 277, 531, 13th ed.; Tudor's Leading Cases on Real Property, 470 *sq.*, 3rd ed.; Davidson, Prec. Conv. vol. iii. pp. 336—338, 3rd ed.; Jarm. Wills, i. 258, ii. 845, 4th ed.: Gray, Rule against Perpetuities, 135 *sq.*, 204—213: Challis on Real Property, 159; 183, 2nd ed.

(*s*) Davidson, Prec. Conv. vol. iii. pp. 338, 986, 3rd ed.

(*t*) *Whithy* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85. The decision in this case has given rise to a great deal of controversy; see L. Q. R. vi. 410: xiv. 133, 234 (by the present writer); xv. 71.

(*u*) This rule, it is submitted, does not extend to make void an estate limited to the unborn child of an unborn person (as to the first grandson of A., a bachelor) in remainder expectant on the determination of a life estate given to a *living* person; see L. Q. R. xiv. 241. And it is submitted that a remainder limited to the unborn child of an unborn person after a remainder given to the unborn parent *in tail* should be held valid because it could be barred by a disentailing assurance; see *post*, p. 404, n. (*d*).

to the ignorance of testators, that they have endeavoured to carry the intention of the testator into effect, *as nearly as can possibly be done*, without infringing the rule of law, which makes such a remainder void. Accordingly, they take the liberty of altering his will to what they presume he would have done had he been acquainted with the rule which prohibits the son of any unborn son from being, in such circumstances, the object of a gift. This, in law French, is called the *cy-près* doctrine (*x*). From what has already been said, it will be apparent that the utmost that can be legally accomplished towards securing an estate in a family is to give to the unborn sons of a living person estates in tail; such estates, if not barred, will descend on the next generation; but the risk of the entails being barred, cannot by any means be prevented. The Courts, therefore, when they meet with such a disposition as above described, instead of confining the unborn son of the living person to the mere life estate given him by the terms of the will, and annulling the subsequent limitations to his offspring, give to such son an estate in tail, so as to afford to his issue a chance of inheriting should the entail remain unbarred. But this doctrine, being rather a stretch of judicial authority, is only applied where the estates given by the will to the children of the unborn child are estates in tail, and not where they are estates for life (*y*), or in fee simple (*z*). If, however, the estate be in tail, the rule equally applies, whether the estates tail be given to the sons successively according to seniority, or to all the children equally as tenants in common (*a*).

(*x*) Fearne C. R. 204. note; 1 Jarm. Wills, 267, 5th ed.; *Vanderplank* v. *King*, 3 Hare, 1; *Mongpenny* v. *Dering*, 16 M. & W. 418; *Hampton* v. *Holman*, 5 Ch. D. 183.

(*y*) *Seaward* v. *Willock*, 5 East, 198. See, however, per Rolt, L. J., in *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93, 99; and per Jessel, M. R., in *Hampton* v. *Holman*, 5 Ch. D. 183, 193.

(*z*) *Bristow* v. *Warde*, 2 Ves. jun. 336. 2 R. R. 235; *Hale* v. *Pew*, 25 Beav. 335.

(*a*) *Pitt* v. *Jackson*, 2 Bro. C. C. 51; *Vanderplank* v. *King*, 3 Hare, 1.

Rule 3.

But in the same year, in which the second rule here given was established as law, a case occurred for which the above rules were insufficient to provide. Accordingly, the policy of the law restraining every contrivance to create a perpetuity (*b*) was again invoked; and the limitation of successive contingent remainders was declared to be subject to a further rule, which appears to be this:—that a contingent remainder limited to take effect after a contingent remainder will be void, unless it must necessarily vest within the period allowed by the rule against perpetuities (*c*). Thus, if land be limited to A., a bachelor, for life, and after his death to his first son for life, and after the son's death, to A.'s eldest daughter who shall *then* be living; here the contingent remainder to A.'s eldest daughter living at his son's death will be void; because it could not vest till the son's death, which might obviously occur more than twenty-one years after the death of A. This rule, however, is subject to the proviso, that it shall not apply to the case of a contingent remainder limited to to take effect on the termination of an estate tail originally limited as a contingent remainder: for in this case the latter remainder may be defeated by barring the entail; it does not therefore tend to tie up property beyond all power of alienation (*d*).

Contingent remainders of trust estates.

Contingent remainders of trust estates (*e*) are void if they are limited, so that they may exceed the limit prescribed by law to the creation of executory interests (*f*). Thus, if land be conveyed unto and to the use of trustees and their heirs, upon trust for A. for life, and after his

(*b*) *Ante*, p. 395.

(*c*) *Re Frost*, 43 Ch. D. 246. See 1 Jarm. Wills, 251, 5th ed. All limitations ulterior to a void remainder are, as a rule, also void: *ib.* 253—259.

(*d*) *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215; *Phillips* v. *Deakin*, 1 M. & S. 744; *Cole* v. *Sewell*, 2 Conn. & Laws. 344; 4 Dru. & War. 1; 2 H. L. C. 186; Sugd. Law of Property, 120.

(*e*) *Ante*, p. 365.

(*f*) *Abbiss* v. *Burney*, 17 Ch. D. 211.

decease for such son of A. as shall first attain the age of twenty-four years, the limitation to the son of A. is void for remoteness (*g*). The reason for this distinction between legal and equitable estates is, that, in the case of the latter, the freehold is in the trustees, and the rule of law, that a contingent remainder would fail if it did not vest before or at the termination of the particular estate, cannot apply (*h*). And equity, in giving effect to contingent remainders of trust estates, has held them to be subject to the rules as to remoteness, which apply to executory interests.

It thus appears that the general principle of legal policy, forbidding all such limitations as tend to create a perpetuity, has been applied to contingent remainders as well as executory interests. But when we inquire, what limitations in particular are held to create a perpetuity, we find that the law has answered the question in one way as regards contingent remainders of legal estates, and in another as regards executory interests and contingent remainders of equitable estates: the result is that the subject of remoteness of limitation is particularly distinguished by what the Romans termed *inelegantia juris*. This is, no doubt, deplorable; but, as has been already pointed out (*i*), we must take the law as we find it.

Estates under special power take effect as if they had been inserted in the settlement.

Where powers of appointment are given in favour of particular objects, as the appointor's children (*k*), the estates which arise from the exercise of the power take effect precisely as if such estates had been inserted in the settlement, by which the power was given. Each estate, as it arises under the power, takes its place in the settlement in the same manner as it would have done had it been originally limited to the appointee,

(*g*) *Ante*, p. 396.
(*h*) *Ante*, p. 365.
(*i*) *Ante*, p. 1, n. (*i*).
(*k*) *Ante*, p. 386.

without the intervention of any power; and, if it would have been void for remoteness in the original settlement, it will be equally invalid as the offspring of the power (*l*).

Succession Duty.

Before leaving the subject of settlements, it may be mentioned that by the Succession Duty Act, 1853 (*m*), every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying on or after the 19th of May, 1853, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, is deemed to confer on the person so entitled a "succession;" in respect of which he is charged with duty payable on his becoming entitled in possession (*n*). So that "successions" chargeable with duty may arise on the death, after the Act, of a tenant for life under any settlement made before or after the Act. In such cases the rate of duty is determined by the relationship between the successor and the settlor. The dispositions, which may confer successions liable to duty under this Act, include the exercise of a general or limited power of appointment (*o*).

(*l*) Co. Litt. 271 b. n. (1). vii. 2: *Whithy* v. *Mitchell*, 42 Ch. D. 494, 44 Ch. D. 85.

(*m*) Stat. 16 & 17 Vict. c. 51, s. 2; see *Wilcox* v. *Smith*, 4 Drew. 40; *A.-G.* v. *Middleton*, 3 H. & N. 125.

(*n*) Sects. 10, 20.

(*o*) *Re Lorelace*, 4 De G. & J. 310. In the case of limited powers, the rate of duty is determined by the relationship between the donor of the power and the appointee; sect. 4. The general rule is the same in the case of general powers: *A.-G.* v. *Charlton*, 4 App. Cas. 127. But by sect. 4, upon the exercise of a general power, which has taken effect (*i.e.*, become exercisable on a death after the Act, the *appointor* is to be deemed to be entitled to the property appointed as a succession derived from the donor of the power. If in such a case the appointment be made to take effect on a death (as if it be exercised by will, or being made by deed, its operation be suspended until the determination of some life interest) the appointee will take the property as a succession derived from the appointor: *A.-G.* v. *Upton*, L. R. 1 Ex. 224. See Hanson on Succession Duty, 244—246, 255—259, 3rd ed.

Estate Duty.

By the Finance Act, 1894 (*p*), estate duty is leviable in the event of a death after the 1st of August, 1894, upon the principal value of any property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. So that estate duty, as well as succession duty, is now chargeable, on the death of a tenant for life under a settlement of land. The same Act makes estate duty leviable in respect of any property, over which the deceased had a general power of appointment (*q*). The nature of succession and estate duty has been already explained (*r*).

Creditors' rights against reversions and remainders.

Judgments were charges on the judgment debtor's estates in reversion or remainder under the old law (*s*), though not on contingent interests until they vested (*t*). And the Judgments Act, 1838 (*u*), made judgments a charge on all lands to which the judgment debtor was entitled for any estate or interest at law or in equity, whether in possession, reversion, remainder or expectancy. But as we have seen (*x*), the Judgments Act, 1864 (*y*), provided that judgments thereafter entered up should not be a charge on any land until actually delivered in execution (*z*); and under the Land Charges Act, 1900 (*a*), a judgment shall not operate as a charge on any interest in land unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Act of 1888 (*b*). Estates in reversion or

(*p*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2, 24; see *A.-G.* v. *Beach*, 1899, A. C. 53; stat. 63 Vict. c. 7, s. 11, altering the law laid down in *A.-G.* v. *De Préville*, 1900, 1 Q. B. 223.

(*q*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2, 22 (2 a). It is not provided that the duty shall be leviable only in the event of the exercise of the power: but it remains to be seen what construction the Court will place upon the words of the Act.

(*r*) *Ante*, pp. 257—260.

(*s*) *Ante*, pp. 261—264.

(*t*) 3 Prest. Abst. 326.

(*u*) Stat. 1 & 2 Vict. c. 110, s. 13; *ante*, p. 264.

(*x*) *Ante*, p. 266.

(*y*) Stat. 27 & 28 Vict. c. 112.

(*z*) See *Hood Barrs* v. *Cathcart*, 1895, 2 Ch. 411.

(*a*) Stat. 63 & 64 Vict. c. 26, s. 2; *ante*, p. 267.

(*b*) Stat. 51 & 52 Vict. c. 51, s. 5; *ante*, p. 267.

remainder expectant on a freehold estate cannot be taken in execution under a writ of *elegit*, which only extends to lands, of which the judgment debtor is seised or possessed (*c*). Any estate or interest, whether vested, contingent or executory (*d*), in lands or hereditaments, will vest in the creditors' trustee in case of the owner's bankruptcy (*e*), or will be assets for payment of his debts after his death (*f*).

Bankruptcy.

(*c*) *Re South*, L. R. 9 Ch. 369. As the owner of the reversion on a lease for years is seised of the land (*ante*, pp. 36, n. (*c*), 324), his estate may be taken under an *elegit*; *Mayor of Poole* v. *Whitt*, 15 M. & W. 571. An order appointing a receiver of the profits of a legal estate, to which a judgment debtor is entitled in reversion or remainder expectant on an estate of freehold, does not operate as a delivery in execution of that estate; *Re Harrison & Bottomley*, 1899, 1 Ch. 465. Equitable execution against equitable reversions or remainders seems justified by *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202, but opposed to the principles laid down in *Holmes* v. *Millage*, 1893, 1 Q. B. 551.

(*d*) See *Jones* v. *Roe*, 3 T. R. 88, 1 R. R. 656.

(*e*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168; *ante*, p. 271.

(*f*) Stats. 3 & 4 Will. IV. c. 104; 60 & 61 Vict. c. 65, s. 2 (3); *ante*, p. 276.

CHAPTER V.

OF HEREDITAMENTS PURELY INCORPOREAL.

We now come to the consideration of incorporeal hereditaments, usually so called, which, unlike a reversion, a remainder, or an executory interest, are ever of an incorporeal nature, and never assume a corporeal shape. Of these purely incorporeal hereditaments there are three kinds, namely, first, such as are *appendant* to corporeal hereditaments; secondly, such as are *appurtenant*; both of which kinds of incorporeal hereditaments are transferred simply by the conveyance, by whatsoever means, of the corporeal hereditaments to which they may belong; and thirdly, such as are *in gross*, or exist as separate and independent subjects of property, and are accordingly said to lie in grant, and have always required a deed for their transfer (*a*). But almost all purely incorporeal hereditaments may exist in both the above modes, being at one time appendant or appurtenant to corporeal property, and at another time separate and distinct from it.

Three kinds purely incorporeal hereditaments.

1. Of incorporeal hereditaments which are appendant to such as are corporeal, the first we shall consider is a seignory or lordship. In a previous part of our work (*b*), we have noticed the origin of manors. Of such of the lands belonging to a manor as the lord granted out in fee simple to his free tenants, nothing remained to him but his seignory or lordship. By the grant of an estate in fee simple, he necessarily parted with the possession.

A seignory

(*a*) *Ante*, p. 31. (*b*) *Ante*, p. 40.

Thenceforth his interest, accordingly, became incorporeal in its nature. But he had no reversion; for no reversion can remain, as we have already seen (*c*), after an estate in fee simple. The grantee, however, became his tenant, did to him fealty, and paid to him his rent-service, if any were agreed for. This simply having a free tenant in fee simple was called a seignory. To this seignory the rent and fealty were incident, and the seignory itself was attached or appendant to the manor of the lord, who had made the grant; whilst the land granted out was said to be holden of the manor. Very many grants were thus made, until the passing of the statute of *Quia emptores* (*d*) put an end to these creations of tenancies in fee simple, by directing that on every such conveyance the feoffee should hold of the same immediate lord as his feoffor held before (*e*). But such tenancies in fee simple as were then already subsisting were left untouched, and they still remain in all cases in which freehold lands are holden of any manor. The incidents of such a tenancy, so far as respects the tenant, have been explained in the chapter on free tenure. The correlative rights belonging to the lord form the incidents of his seignory. The seignory, with all its incidents, is an appendage to the manor of the lord, and a conveyance of the manor simply, without mentioning its appendant seignories, will accordingly comprise the seignories, together with all rents incident to them (*f*). In ancient times it was necessary that the tenant should attorn to the feoffee of the manor, before the rents and services could effectually pass to him (*g*). For, in this respect, the owner of a seignory was in the same position as the owner of a reversion (*h*). But the same statute (*i*) which abolished attornment

Attornment.

(*c*) *Ante*, p. 335.
(*d*) 18 Edw. I. c. 1.
(*e*) *Ante*, pp. 39. 72.
(*f*) Perk. s. 116.
(*g*) Co. Litt. 310 b.
(*h*) *Ante*, p. 330.
(*i*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 9; *ante*, p. 331.

in the one case abolished it also in the other. No attornment, therefore, is now required.

Other kinds of appendant incorporeal hereditaments are rights of *common*, such as *common of turbary*, or a right of cutting turf in another person's land; *common of piscary*, or a right of fishing in another's water: and *common of pasture*, which is the most usual, being a right of depasturing cattle on the land of another (*k*). Rights of common owe their origin to the necessities of the agricultural village communities, which, as we have seen (*l*), were spread over England at the time of the Norman Conquest (*m*). It will be remembered that the land used to be cultivated upon the common field system, the various holdings being composed of strips of land lying dispersed among the common fields of the village. The rights of common enjoyed by the holders of arable land were accordingly of two kinds: first, to put in cattle to range over the whole of a common field, during such time as it lay fallow; secondly, to pasture their cattle on the waste lands of the village. The holders of strips in the common meadows also enjoyed the right of putting in cattle to graze over the whole, when not closed for raising the hay-crop (*n*). When the English *maneria* had been generally subjected to the law of feudal tenure (*o*), it was considered that the soil of the waste lands of a manor belonged to the lord of the manor, subject, however, to the common rights of his tenants to depasture cattle thereon (*p*). And after the freeholders had become the most prominent tenants of

Rights of common.

Common of pasture.

(*k*) For further information upon this subject the reader is referred to the late author's Treatise on Rights of Common.

(*l*) *Ante*, p. 41.

(*m*) Williams on Commons, 37 *sq.*; Vinogradoff, Vill. in Eng., Essay II., ch. ii.

(*n*) *Ante*, pp. 41, 62: Vinogradoff, Vill. in Eng. 259, 260.

(*o*) *Ante*, p. 42.

(*p*) See Bract. fo. 227, 228: Williams on Commons, 103 *sq.*, 150; Scrutton, Commons, 39—41; Vinogradoff, Vill. in Eng. 271—275; *Lancashire* v. *Hunt*, 10 Times L. R. 310; stat. 56 & 57 Vict. c. 57.

a manor (*q*), it was established as law that every freeholder of ancient arable land held of a manor may, of common right (that is, by the common law alone, independently of grant or agreement) depasture on the lord's wastes such a number of commonable beasts as he can maintain, when the common is not available, upon his holding (*r*). And this right was designated common appendant (*s*). The right of common pasture in the common fields appears, properly, to have been also of common right (*t*). Owing to the general inclosure of common lands, which has been before mentioned (*u*), rights of common in common fields are now practically extinct. Rights of common over wastes have been also extinguished in many cases by the inclosure of waste lands (*x*). But in other cases they still remain, and of late years they have in many instances been successfully asserted (*y*). Any conveyance of the lands, to which such rights belong, will comprise such rights of common also (*z*). The regulation of Metropolitan and other commons is now provided for by statute (*a*).

Advowson appendant.

Another kind of appendant incorporeal hereditament is an advowson appendant to a manor. But on this head we shall reserve our observations till we speak of the now more frequent subject of conveyance, an advowson *in gross*, or an advowson unappended to any thing corporeal.

(*q*) *Ante*, pp. 44, 50.

(*r*) Williams on Commons, 31 *sq.*, 103.

(*s*) Litt. s. 184; Co. Litt. 122 a; 5 Rep. 37, 38. See P. & M. Hist. Eng. Law, i. 610—612.

(*t*) Williams on Commons, 67—69; Vinogradoff, Vill. in Eng. 261, 268—271.

(*u*) *Ante*, p. 62.

(*x*) See Williams on Commons, 246 *sq.*; Scrutton, Commons, ch. vi., vii.

(*y*) See *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241; *Warrick* v. *Queen's College*, L. R. 10 Eq. 105, 6 Ch. 716; *Betts* v. *Thompson*, L. R. 6 Ch. 732; *Hall* v. *Byron*, 4 Ch. D. 667; *Robertson* v. *Hartopp*, 43 Ch. D. 484.

(*z*) Litt. s. 183; Co. Litt. 121 b.

(*a*) Stats. 29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107; 39 & 40 Vict. c. 56, amended by 42 & 43 Vict. c. 37; 62 & 63 Vict. c. 30; Williams on Commons, 255 *sq.*

In connection with the subject of commons, it may be mentioned that strips of waste land between an inclosure and a highway, and also the soil of the highway to the middle of the road, presumptively belong to the owner of the inclosure (*b*). And on a conveyance of the inclosure (*c*), even by reference to a plan which does not comprise the highway (*d*), the presumption is that the soil, as far as one-half of the road, will pass. But if the strips of waste land communicate so closely to a common as in fact to form part of it, they will then belong to the lord of the manor, as the owner of the common (*e*). Where a public way is foundrous, as such ways frequently were in former times, the public have by the common law a right to travel over the adjoining lands, and to break through the fences for that purpose (*f*). It is said that in former times the landowners, to prevent their fences being broken and their crops spoiled when the roads were out of repair, set back their hedges, leaving strips of waste at the side of the road, along which the public might travel without going over the lands under cultivation. Hence such strips are presumed to belong to the owners of the lands adjoining (*g*). If the same person own the land on both sides of the highway, the soil of the whole road is presumed to be his (*h*). Where lands adjoin a river, the soil of one-half of the river to the middle of the stream is presumed to belong to the owner of the adjoining lands (*i*). But if it be a tidal river, the soil up to high

Strips of waste by the side of roads.

Soil of river.

(*b*) *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Scoones* v. *Morrell*, 1 Beav. 251.

(*c*) *Simpson* v. *Dendy*, 8 C. B., N. S. 433; *Re White's Charities*, 1898, 1 Ch. 659; see *Leigh* v. *Jack*, 5 Ex. D. 264.

(*d*) *Berridge* v. *Ward*, 10 C. B., N. S. 400; see *Pryor* v. *Petre*, 1894, 2 Ch. 11.

(*e*) *Grose* v. *West*, 7 Taunt. 39, 17 R. R. 437; *Doe* d. *Barrett* v. *Kemp*, 2 Bing. N. C. 102.

(*f*) Com. Dig. Chimin. (D. 6); *Dawes* v. *Hawkins*, 8 C. B., N. S. 848.

(*g*) *Steel* v. *Prickett*, 2 Stark. 468, 20 R. R. 717.

(*h*) *Harrison* v. *Rutland*, 1893, 1 Q. B. 142.

(*i*) Hale de jure maris, ch. 1; *Wishart* v. *Wylie*, 2 Stuart, Thomson, Milne, Morison & Kinnear's Scotch Cases, H. L. 68; *Bickett* v. *Morris*, L. R. 1 Sc. App. 47; *Lord* v. *The Com-*

water mark appears presumptively to belong to the Crown (*k*). The Crown is also presumptively entitled to the sea-shore up to high water mark of medium tides (*l*) : although grants of parts of the sea-shore have not unfrequently been made to subjects (*m*) ; and such grants may be presumed by proof of long continued and uninterrupted acts of ownership (*n*). A sudden irruption of the sea gives the Crown no title to the lands thrown under water (*o*) ; although when the sea makes gradual encroachments, the right of the owner of the land encroached on is as gradually transferred to the Crown (*p*). And in the same manner when the sea gradually retires, the right of the Crown is as gradually transferred to the owner of the land adjoining the coast (*q*). But a sudden dereliction of the sea does not deprive the Crown of its title to the soil (*r*).

Sea-shore.

Appurtenant incorporeal hereditaments arise by grant or prescription.

2. Incorporeal hereditaments *appurtenant* to corporeal hereditaments are not very often met with. They consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them, either by some express deed of grant, or by *prescription* from long enjoyment. Rights of common and rights of way or passage over the property of another person are the

Appurtenant rights of common and of way.

missioners for the City of Sydney, 12 Moore's P. C. Cases, 473 ; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133. See *Devonshire* v. *Pattinson*, 20 Q. B. D. 263.

(*k*) Hale de jure maris, ch. 4, p. 13 ; *Gann* v. *The Freefishers of Whitstable*, 11 H. L. C. 192.

(*l*) *A.-G.* v. *Chambers*, 4 De G. M. & G. 206 ; *R.* v. *Gee*, 1 E. & E. 1068. As to the rights of a riparian owner upon a navigable tidal river, see *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662 ; *North Shore Railway Co.* v. *Pion*, 14 App. Cas. 612.

(*m*) *Scratton* v. *Brown*, 4 B. & C. 485, 495.

(*n*) *Beaufort* v. *Swansea*, 3 Ex. 413 ; *Calmady* v. *Rowe*, 6 C. B. 861.

(*o*) 2 Black. Comm. 262.

(*p*) *Re Hull and Selby Railway*, 5 M. & W. 327.

(*q*) 2 Bl. Comm. 262 ; *R.* v. *Lord Yarborough*, 3 B. & C. 91, 5 Bing. 163. As to the gradual change of a river bed see *Foster* v. *Wright*, 4 C. P. D. 438 ; *Hindson* v. *Ashby*, 1896. 2 Ch. 1.

(*r*) 2 Black. Comm. 262.

principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed, without mention of the appurtenances (*s*); although these words, "with the appurtenances," have been usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not have been strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, would not have been sufficient to comprise them (*t*). It was, therefore, usual in conveyances to insert at the end of the "parcels," or description of the property, a number of "general words" in which were comprised, not only all rights of way and common, &c., which might belong to the premises, but also such as might be therewith used or enjoyed (*u*). But now, by the Conveyancing Act of 1881 (*x*), a conveyance of land made after the year 1881 shall be deemed to include and shall by virtue of the Act operate to convey, with the land, all commons, ways, and other liberties, privileges, easements, rights, and advantages whatsoever

Appurtenances.

(*s*) Co. Litt. 121 b.

(*t*) *Harding* v. *Wilson*, 2 B. & C. 96; *Barlow* v. *Rhodes*, 1 Cro. & M. 439. See also *James* v. *Plant*, 4 A. & E. 749; *Hinchliffe* v. *Earl of Kinnoul*, 5 N. C. 1; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Ackroyd* v. *Smith*, 10 C. B. 164; *Worthington* v. *Gimson*, 2 E. & E. 618; *Baird* v. *Fortune*, 10 W. R. 2; 7 Jur., N. S. 926; *Wardle* v. *Brocklehurst*, 1 E. & E. 1058; *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Brett* v. *Clowser*, 5 C. P. D. 376; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Baring* v. *Abingdon*, 1892, 2 Ch. 374. The like law of a contract to sell land with the appurtenances, *Re Peck & London School Board*, 1893, 2 Ch. 315.

(*u*) As to the effect of general words, see Wms. Conv. Stat. 60, 65, 66; Williams on Commons, 316—319, 323.

(*x*) Stat. 44 & 45 Vict. c. 41, s. 6, sub-s. 1; see Wms. Conv. Stat. 60—74; *Broomfield* v. *Williams*, 1897, 1 Ch. 602. This enactment applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms thereof; s. 6, sub-s. 1.

reputed to appertain to, or at the time of conveyance enjoyed with, the land or any part thereof. In consequence of this enactment, general words are now rarely employed (*y*).

3. Such incorporeal hereditaments as stand separate and alone are generally distinguished from those which are appendant or appurtenant, by the appellation *in gross*. Of these, the first we may mention is a seignory *in gross*, which is a seignory that has been severed from the demesne lands of the manor, to which it was anciently appendant (*z*). It has now become quite unconnected with anything corporeal, and, existing as a separate subject of transfer, it must be conveyed by deed of grant.

A seignory in gross.

Rent seck.

The next kind of separate incorporeal hereditament is a rent seck (*redditus siccus*), a dry or barren rent, so called, because no distress could formerly be made for it (*a*). This kind of rent forms a good example of the antipathy of the ancient law to any inroad on the then prevailing system of tenures. If a landlord granted his seignory, or his reversion, the rent service, which was incident to it, passed at the same time. But if he should have attempted to convey his rent, independently of the seignory or reversion to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it (*b*). It would have been a *rent seck*. Rent seck also occasionally arose from grants being made of rent charges, to be hereafter explained, without any clause of distress (*c*). But, by an Act of Geo. II. (*d*), a remedy by distress was given for rent seck, in the same manner as for rent reserved upon lease. The grantee of a rent

(*y*) See Wms. Conv. Stat. 69, 497, and *post*, Part VI.
(*z*) 1 Scriv. Cop. 5.
(*a*) Litt. s. 218.
(*b*) Litt. ss. 225, 226, 227, 228, 572.
(*c*) Litt. ss. 217, 218.
(*d*) Stat. 4 Geo. II. c. 28, s. 5.

seek, however, was not without remedy, at common law, for its recovery. For if he had once received any part of it, he might take proceedings in the nature of a real action against the tenant of the land, out of which the rent issued, if the tenant refused further payment (*e*). Indeed, a man might have all manner of real actions of a rent, which issued out of land, if he had once had seisin (*f*) of any part of the rent (*g*). After real actions to recover such rents had been abolished, along with the other real actions (*h*), the grantee of the rent was allowed a remedy, in their place, by suing personally the tenant of the land (*i*). He may also apply to a Court of Equity to order any arrears of the rent to be raised by sale or mortgage of the land; but the granting of such relief is discretionary (*k*).

A rent charge.

The same remedies are applicable in the case of another important kind of separate incorporeal hereditament, namely, a rent charge. This arises on a grant by one person to another of an annual sum of money, payable out of certain lands in which the grantor may have any estate, with power to distrain on the lands in the event of non-payment. The rent charge cannot, of course, continue longer than the estate of the grantor: but, supposing the grantor to be seised in fee simple, he may make a grant of a rent charge for any estate he pleases, giving to the grantee a rent charge for a term of years, or for his life, or in tail, or in fee simple (*l*). For this purpose a *deed* is absolutely necessary; for a

A deed required.

(*e*) Litt. ss. 233, 341; 9 M. & W. 123.

(*f*) *Ante*, p. 36.

(*g*) Litt. ss. 218, 233, 235, 236; Co. Litt. 160 a; P. & M. Hist. Eng. Law, ii. 128 *sq.*; *ante*, p. 31.

(*h*) Stat. 3 & 4 Will. IV. c. 27, s. 36; *ante*, p. 64, n. (*g*).

(*i*) *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, &c., Building Society. Ex parte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519; *Pertwee* v. *Townsend*, 1896, 2 Q. B. 129; *Re Herbage Rents*, 1896, 2 Ch. 811. The decision in *Thomas* v. *Sylvester* is criticised by the present writer in L. Q. R. xiii. 288.

(*k*) *Hambro* v. *Hambro*, 1894, 2 Ch. 564.

(*l*) Litt. ss. 217, 218.

rent charge, being a separate incorporeal hereditament, cannot, according to the general rule, be created or transferred in any other way (*m*), unless indeed it be given by will. By an Act of 1855 any annuity or rent charge granted after the passing of the Act, otherwise than by marriage settlement or will, for a life or lives, or for any estate determinable on a life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees or creditors, unless registered, formerly in the Court of Common Pleas (*n*), and now in the Central Office of the Supreme Court, against the name of the person, whose estate is intended to be affected (*o*). A search for annuities is accordingly made in this registry on every purchase of lands, in addition to the other usual searches (*p*). It has been decided, however, in accordance with the doctrines applied by the Courts of Equity in the construction of the Middlesex and Yorkshire Registry Acts (*q*), that rent charges are valued in equity against purchasers, who have *notice* of them, although they be not registered (*r*). By the Land Charges Act of 1888 (*s*), rent charges created after that year under the Land Improvement Acts already mentioned (*t*) are void as against a purchaser for value of the land charged, or any interest therein, unless duly registered at the Office of Land Registry. And after the expiration of one year from the first assignment made

Registration of life annuities now required.

Registration of land improvement rent charges.

(*m*) Litt. *ubi sup.*

(*n*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14; passed 26th April, 1855. Annuities for or determinable on any life or lives, granted for valuable consideration, and not secured on lands of equal or greater value than the annuity, and belonging to the grantor for an estate in fee or in tail in possession, were formerly made void by statute, unless a memorial thereof were duly enrolled in the Court of Chancery; stats. 17 Geo. III. c. 26; 53 Geo. III. c. 141; 3 Geo. IV. c. 92; 7 Geo. IV. c. 75. But as these annuities were only granted for the sake of evading the Usury Laws (see 2 Black Comm. 461), the same statute which repealed those laws also repealed the statutes above mentioned: stat. 17 & 18 Vict. c. 90.

(*o*) See *ante*, p. 266, n. (*g*).

(*p*) *Ante*, p. 287.

(*q*) *Ante*, pp. 206, 255.

(*r*) *Greares* v. *Tofield*, 14 Ch. D. 563.

(*s*) Stat. 51 & 52 Vict. c. 51, s. 12; see ss. 2, 4.

(*t*) *Ante*, p. 124.

by act *inter vivos* after that year of a similar rent charge previously created, the person entitled thereto shall not be able to recover the same as against a purchaser for value of the land charged, or any interest therein, unless the charge be duly registered in the same place before the completion of the purchase (*u*).

Creation of rent charges under the Statute of Uses.

In settlements where rent charges are often given by way of pin-money and jointure, they are usually created under a provision for the purpose contained in the Statute of Uses (*x*). The statute directs that where any persons shall stand seised of any lands, tenements, or hereditaments, in fee simple or otherwise, *to the use and intent* that some other person or persons shall have yearly to them and their heirs, or to them and their assigns, for term of life or years or some other special time, any annual rent, in every such case the same persons, their heirs and assigns, *that have such use* to have any such rent shall be adjudged and deemed in possession and seisin of the same rent of such estate as they had in the use of the rent; and they may distrain for non-payment of the rent in their own names. From this enactment it follows, that if a conveyance of lands be now made to A. and his heirs,—*to the use* and intent that B. and his assigns may, during his life, thereout receive a rent charge,—B. will be entitled to the rent charge, in the same manner as if a grant of the rent charge had been duly made to him by deed. The above enactment, it will be seen, is similar to the prior clause of the Statute of Uses relating to uses of estates (*y*), and is merely a carrying out of the same design, which was to render every use, then cognizable only in Chancery, an estate or interest within the jurisdiction of the courts of law (*z*). But in this case, also, as well as in the

(*u*) Sect. 13.
(*x*) Stat. 27 Hen. VIII. c. 10. ss. 4, 5. See the form of settlement given in Part VI., *post*.
(*y*) *Ante*, p. 171.
(*z*) *Ante*, pp. 171, 173.

former, the end of the statute has been defeated. For a conveyance of land to A. and his heirs, *to the use* that B. and his heirs may receive a rent charge, *in trust* for C. and his heirs, will now be laid hold of under the equitable doctrines of the Court of Chancery for C.'s benefit, in the same manner as a trust of an estate in the land itself. The statute vests the *legal estate* in the rent in B.; and C. takes no legal estate, because the trust for him would be a use upon a use (*a*). But C. has the entire beneficial interest: and he is possessed of the rent charge for an *equitable estate* in fee simple.

Clause of distress.

In ancient times it was necessary, on every grant of a rent charge, to give an express power to the grantee to distrain on the premises out of which the rent charge was to issue (*b*). If this power were omitted, the rent was merely a *rent seck*. Rent service, being an incident of tenure, might be distrained for by common right; but rent charges were matters the enforcement of which was left to depend solely on the agreement of the parties. But since a power of distress has been attached by Parliament (*c*) to rents seck, as well as to rents service, an express power of distress has not been necessary for the security of a rent charge (*d*). Such a power, however, was usually granted in express terms. In addition to the clause of distress, it was also usual, as a further security, to give to the grantee a power to enter on the premises after default had been made in payment for a certain number of days, and to receive the rents and profits until all the arrears of the rent charge, together with all expenses, should have been duly paid (*e*).

Power of entry.

(*a*) *Ante*, pp. 175—177.

(*b*) Litt. s. 218.

(*c*) Stat. 4 Geo. II. c. 28, s. 5: *ante*, p. 416. See *Johnson* v. *Faulkner*, 2 Q. B. 925, 935; *Miller* v. *Green*, 8 Bing. 92: 2 Cro. & Jerv. 142: 2 Tyr. 1.

(*d*) *Saward* v. *Anstey*, 2 Bing. 519: *Buttery* v. *Robinson*, 3 Bing. 392; *Dodds* v. *Thompson*, L. R., 1 C. P. 133.

(*e*) The law regards such a power of re-entry as part of the estate which the grantee has in the rent: and it is therefore not obnoxious to the rule against per-

Statutory powers of distress, entry, &c.

The following remedies are now given by the Conveyancing Act of 1881 (*f*) to any person entitled to a rent charge or any other annual sum, payable half-yearly or otherwise, not being rent incident to a reversion, charged upon any land, or the income thereof, by virtue of any instrument coming into operation after the year 1881 :—(1) a power of distress, if the annual sum or any part thereof is unpaid for *twenty-one* days next after the time appointed for any payment in respect thereof; (2) a power, if the annual sum or any part thereof is unpaid for *forty* days next after the time appointed for any payment in respect thereof, to enter into possession of and hold the land charged or any part thereof, without impeachment of waste, and to take the income thereof, until all arrears due at the time of entry or afterwards becoming due and all expenses have been fully paid; (3) a power, in the like case, whether possession be taken or not, to demise by deed the land charged or any part thereof to a trustee for a term of years, upon trust to raise and pay all arrears due or to become due and all expenses. These statutory remedies are conferred, subject and without prejudice to all estates, interests and rights having priority to the annual sum, and only as far as they might have been conferred by the instrument under which the annual sum arises (*g*). Reliance upon this enactment has generally superseded the employment of express powers of distress and entry upon the grant of a rent charge (*h*).

Land improvement rent charges.

By the Improvement of Land Act, 1899 (*i*), rent charges created either before or after that Act under the

petuities; *Harergill* v. *Hare*, Cro. Jac. 510; Sugd. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; *ante*, p. 395.

(*f*) Stat. 44 & 45 Vict. c. 41. s. 44, which applies only if and so far as the contrary intention is not expressed in the instrument, and has effect subject to its terms; sub-s. 5. See Wms. Conv. Stat. 215—217.

(*g*) Sect. 44. sub-s. (1).

(*h*) See Wms. Conv. Stat. 216, 217. 519.

(*i*) Stat. 62 & 63 Vict. c. 46, s. 3.

Improvement of Land Act, 1864, or any special improvement Act (*k*), shall be recoverable as regards any instalment accruing due after the year 1899, by the like remedies as are provided by the Conveyancing Act of 1881, in respect of rent charges thereafter created, *and not otherwise*. This appears to preclude the owners of such rent charges from suing the tenant of the lands charged under the rule established as above-mentioned (*l*).

Estate for life in a rent charge.

Incorporeal hereditaments are the subjects of estates analogous to those which may be holden in corporeal hereditaments. If therefore a rent charge should be granted for the life of the grantee, he will possess an estate for life in the rent charge. Supposing that he should alienate this life estate to another party, without mentioning in the deed of grant the heirs of such party, the law formerly held that, in the event of the decease of the second grantee in the lifetime of the former, the rent charge became extinct for the benefit of the owner of the lands out of which it issued (*m*). The former grantee was not entitled because he had parted with his estate: the second grantee was dead, and his heirs were not entitled because they were not named in the grant. Under similar circumstances, we have seen (*n*) that, in the case of a grant of corporeal hereditaments, the first person that might happen to enter upon the premises after the decease of the second grantee had formerly a right to hold possession during the remainder of the life of the former. But rents and other incorporeal hereditaments are not in their nature the subjects of occupancy (*o*): they do not lie exposed to be taken possession of by the first passer-by. It was accordingly thought that the statutes, which provided a remedy in the case of lands and other corporeal hereditaments,

(*k*) *Ante*, pp. 124, 418.
(*l*) *Ante*, p. 417 & n. (*i*).
(*m*) Bac. Abr. Estate for Life and Occupancy (B).
(*n*) *Ante*, p. 130.
(*o*) Co. Litt. 41 b, 388 a.

were not applicable to the case of a rent charge, but that it became extinct as before mentioned (*p*). By a modern decision, however, the construction of these statutes was extended to this case also (*q*); and now the Wills Act of 1837 (*r*), by which these statutes have been repealed (*s*), permits every person to dispose by will of estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament (*t*); and in case there shall be no special occupant, the estate, whether corporeal or incorporeal, shall go to the executor or administrator of the party; and coming to him, either by reason of a special occupancy, or by virtue of the Act, it shall be applied and distributed in the same manner as the personal estate of the testator or intestate (*u*). Under the Land Transfer Act, 1897 (*x*), a rent charge enjoyed *pur autre vie* devolves on the owner's death after that year in the same manner as a like estate in land (*y*).

The Wills Act, as to estates *pur autre vie*.

Land Transfer Act, 1897.

A grant of an estate tail in a rent charge scarcely ever occurs in practice. But grants of rent charges for estates in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes in consideration of a rent charge in fee simple by way of ground rent, to be granted out of the premises to the original owner. These transactions are accomplished by a conveyance from the vendor to the purchaser and his heirs, *to the*

Estate in fee simple in a rent charge.

(*p*) 2 Black. Comm. 260.
(*q*) *Bearpark* v. *Hutchinson*, 7 Bing. 178.
(*r*) 7 Will. IV. & 1 Vict. c. 26.
(*s*) Sect. 2.
(*t*) Sect. 3.
(*u*) Sect. 6. *Reynolds* v. *Wright*, 25 Beav. 100.
(*x*) Stat. 60 & 61 Vict. c. 65, Part I.; *ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218—221, 241, 282, 286, 311, 344, 358, 372.
(*y*) *Ante*, p. 131.

use that the vendor and his heirs may thereout receive the rent charge agreed on, [and *to the further use* that, if it be not paid within so many days, the vendor and his heirs may distrain, and *to the further use* that, in case of non-payment within so many more days, the vendor and his heirs may enter and hold possession till all arrears and expenses are paid;] and subject to the rent charge, [and to the powers and remedies for securing payment thereof,] *to the use* of the purchaser, his heirs and assigns, for ever. The words within brackets in the above sentence may now be omitted in reliance on the provisions of the Conveyancing Act of 1881, which have already been stated (*z*). The purchaser thus acquires an estate in fee simple in the lands, subject to a perpetual rent charge payable to the vendor, his heirs and assigns (*a*). It should, however, be carefully borne in mind, that transactions of this kind are very different from those grants of fee simple estates which were made in ancient times by lords of manors, and from which quit or chief rents have arisen. These latter rents are rents incident to tenure, and may be distrained for of common right without any express clause for the purpose. But as we have seen (*b*), since the passing of the statute of *Quia emptores* (*c*), it has not been lawful for any person to create a tenure in fee simple. The modern rents of which we are now speaking, are accordingly mere rent charges, and in ancient days would have required express clauses of distress to

(*z*) See *ante*, p. 421; Wms. Conv. Stat. 217.

Stamp duty.

(*a*) By the Stamp Act, 1891 (stat. 54 & 55 Vict. c. 39. s. 56, replacing 33 & 34 Vict. c. 97, s. 72), where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically for a definite period, exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount, which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument. For the duty imposed before 1871, see stat. 17 & 18 Vict. c. 83.

(*b*) *Ante*, p. 39.

(*c*) 18 Edw. I. c. 1.

make them secure. They were formerly considered in law *as against common right* (*d*), that is, as repugnant to the feudal policy, which encouraged such rents only as were incident to tenure. A rent charge was accordingly regarded as a thing entire and indivisible, unlike rent service, which was capable of apportionment. And from this property of a rent charge, the law, in its hostility to such charges, drew the following conclusion: that if any part of the land, out of which a rent charge issued, were released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land should enjoy the same benefit and be released also (*e*). If, however, any portion of the land charged should descend to the owner of the rent as heir at law, the rent would not thereby have been extinguished, as in the case of a purchase, but would have been apportioned according to the value of the land: because such portion of the land came to the owner of the rent, not by his own act, but by the course of law (*f*). But it is now provided (*g*), that the release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released; without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release. The Board of Agriculture is now empowered by statute to apportion rents of every kind on the application of any persons interested in the lands and in the rent (*h*).

A release of part of the land was a release of the whole.

Apportionment on descent of part of the land.

New enactment: release not now an extinguishment.

Apportionment by Board of Agriculture.

(*d*) Co. Litt. 147 b.

(*e*) Litt. s. 222: *Bennett* v. *Pass*, 1 New Cases, 388.

(*f*) Litt. s. 224.

(*g*) Stat. 22 & 23 Vict. c. 35, s. 10; see *Booth* v. *Smith*, 14 Q. B. D. 318.

(*h*) Stats. 17 & 18 Vict. c. 97, ss. 10—14; 45 & 46 Vict. c. 38, s. 18; 52 & 53 Vict. c. 30, s. 2.

Covenant to pay rent charge.

The rent charges, of which we are speaking, are usually further secured by a covenant, for payment entered into by the purchaser in the deed by which they are granted. And when the fee simple of a house or of building land is sold for a perpetual rent charge to issue thereout, the purchaser sometimes covenants to repair the house or to build on the land (*i*). But such covenants are merely personal covenants binding the purchaser and his representatives (*k*); and they cannot be enforced, either at law or in equity, against his *assigns* (*l*) of the land. For although, as we have seen (*m*), covenants by a tenant in fee restricting the use of the land are enforceable in equity against his assigns, who have notice of the covenants, this doctrine is not extended to covenants, which impose such an active duty as to repair or to lay out money on land (*n*). But the rent charge may be recovered by action, in the manner before explained, against the tenant of the freehold for the time being, whether he be the original purchaser, or his heir or his assign (*o*).

Bankruptcy of owner of land subject to rent, &c.

The Bankruptcy Act, 1883 (*p*), provides for the disclaimer by the trustee for the creditors, within the time and under the conditions therein specified, of any part

(*i*) Davidson, Prec. Conv. vol. ii. pt. i. pp. 504 *sq.*, 4th ed.; 1 Key & Elphinstone, Prec. Conv. p. 334 n., 4th ed.

(*k*) By stat. 22 & 23 Vict. c. 35, s. 28, where an executor or administrator liable under such covenants has satisfied all subsisting liabilities, and set aside a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum agreed to be laid out on the property, and has conveyed the property to a purchaser, he may distribute the residuary personal estate without appropriating any part thereof to meet any future liability under such covenants. But this is not to prejudice the right to follow the assets of the deceased into the hands of the persons, amongst whom they may have been distributed. See Wms. Pers. Prop. 101, 437, 15th ed.

(*l*) *Ante*, p. 75.

(*m*) *Ante*, p. 185.

(*n*) *Haywood* v. *Brunswick, &c., Building Society*, 8 Q. B. D. 403; *Austerberry* v. *Oldham*, 29 Ch. D. 750.

(*o*) *Ante*, p. 417, and cases cited in note (*i*).

(*p*) Stat. 46 & 47 Vict. c. 52, s. 55; see Wms. Pers. Prop. 237, 11th ed.

of the property of the bankrupt, which consists of land of any tenure burdened with onerous covenants, or of any other property that is not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money (*q*). And the Court may make an order vesting any disclaimed property (without any conveyance for the purpose) in any person entitled thereto, or a trustee for him, on such terms as the Court thinks just.

Order vesting disclaimed property.

Although rent charges and other self-existing incorporeal hereditaments of the like nature are no favourites with the law, yet, whenever it meets with them, it applies to them, as far as possible, the same rules to which corporeal hereditaments are subject. Thus, we have seen that the estates which may be held in the one are analogous to those which exist in the other. So estates in fee simple, both in the one and in the other, may be aliened by the owner, either in his lifetime or by his will, to one person or to several as joint tenants or tenants in common (*r*), and, on his intestacy, descended to the same heir at law. So also, on the owner's death after the year 1897, his fee simple estate in a rent charge devolves, equally with his like estates in land, upon his executors or administrator, in trust, subject to his debts, for his devisee or heir (*s*). But in one respect the analogy fails. Land is essentially the subject of *tenure;* it may belong to a lord, but be holden by his tenant, by whom again it may be sub-let to another; and so long as rent is rent service, a mere incident arising out of the estate of the payer and belonging to the estate of the receiver, so long may it accompany, as accessory, its

Incorporeal hereditaments subject, as far as possible, to the same rules as corporeal hereditaments.

Tenure an exception.

(*q*) As to the effect of a disclaimer by a trustee in bankruptcy of freehold land subject to a rent charge and burdened with onerous covenants, see *Re Mercer and Moore*, 14 Ch. D. 287, decided under the Bankruptcy Act, 1869.

(*r*) *Ricis* v. *Watson*, 5 M. & W. 255.

(*s*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218—221, 241, 282, 286, 311, 314, 372, 423.

principal, the estate to which it belongs. But the receipt of a rent charge is accessory or incident to no other hereditament. True a rent charge springs from, and is, therefore, in a manner connected with, the land on which it is charged; but the receiver and owner of a rent charge has no shadow of interest beyond the annual payment, and in the abstract right to this payment his estate in the rent consists. Such an estate therefore cannot be subject to any tenure. The owner of an estate in a rent charge consequently owes no fealty to any lord, neither can he be subject, in respect of his estate, to any rent as rent service; nor, from the nature of the property, could any distress be made for such rent service if it were reserved (*t*). So, if the owner of an estate in fee simple in a rent charge should have died intestate, and without leaving any heirs, his estate could not escheat to his lord, for he had none. It simply ceased to exist, and the lands out of which it was payable were thenceforth discharged from its payment (*u*). The Intestates' Estates Act, 1884 (*x*), now enacts that, from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments (*y*). It appears to the writer that the Courts may find some difficulty in applying the law of escheat, in pursuance of this Act, to hereditaments which are not held of any lord.

(*t*) Co. Litt. 47 a, 144 a; 2 Black. Comm. 42. But it is said that the Queen may reserve a rent out of an incorporeal hereditament, for which, by her prerogative, she may distrain on all the lands of the lessee: Co. Litt. 47 a, n. (1); Bac. Abr. tit. Rent (B).

(*u*) Co. Litt. 298 a, n. (2).

(*x*) Stat. 47 & 48 Vict. c. 71. s. 4. passed 14th August, 1884.

(*y*) See *ante*, pp. 48, 55.

Another kind of separate incorporeal hereditament which occasionally occurs is a right of common *in gross*. This is, as the name implies, a right of common over lands belonging to another person, possessed by a man, not as appendant or appurtenant to the ownership of any lands of his own, but as an independent subject of property (*z*). Such a right of common has, therefore, always required a deed for its transfer. Common in gross.

Another important kind of separate incorporeal hereditament is an advowson in gross. An advowson is a perpetual right of presentation to an ecclesiastical benefice (*a*). The owner of the advowson is termed the patron of the benefice: but, as such, he has no property or interest in the glebe or tithes, which belong to the incumbent. As patron he simply enjoys a right of nomination from time to time, as the living becomes vacant. And this right he exercises by a *presentation* to the bishop of some duly qualified clerk or clergyman, whom the bishop is accordingly bound to *institute* to the benefice, and to cause to be *inducted* into it (*b*). When the advowson belongs to the bishop, the forms of presentation and institution are supplied by an act called *collation* (*c*). In some rare cases of advowsons *donative*, the patron's deed of donation was alone sufficient (*d*): but by the Benefices Act, 1898 (*e*), all such advowsons were made presentative. Where the patron is entitled to the advowson as his private property, he is empowered by an Act of Parliament of the reign of George IV. (*f*) Advowsons. Presentation. Institution. Induction. Collation. Donatives.

(*z*) 2 Black. Comm. 33. 34.

(*a*) See P. & M. Hist. Eng. Law. ii. 135 *sq.*

(*b*) 1 Black. Comm. 390. 391. See *ibid.* 389; stat. 61 & 62 Vict. c. 48, s. 2, as to grounds on which a bishop may refuse to institute or admit the presentee.

(*c*) 2 Black. Comm. 22.

(*d*) 2 Black. Comm. 23. By stat. 33 & 34 Vict. c. 97, every appointment, whether by way of donation, presentation or nomination, and admission, collation or institution to or licence to hold any ecclesiastical benefice, dignity or promotion, or any perpetual curacy, was subject to an *ad valorem* duty, which was repealed by stat. 40 Vict. c. 13, s. 13.

(*e*) Stat. 61 & 62 Vict. c. 48, s. 12.

(*f*) Stat. 9 Geo. IV. c. 94.

Agreements for resignation.

to present any clerk under a previous agreement with him for his resignation in favour of any one person named, or in favour of one of two (*g*) persons, each of them being by blood or marriage, an uncle, son, grandson, brother, nephew or grand-nephew of the patron, or one of the patrons beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese (*h*), and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made (*i*).

History of advowsons of rectories.

Advowsons are principally of two kinds,—advowsons of rectories, and advowsons of vicarages. The history of advowsons of rectories is in many respects similar to that of rents and of rights of common. In the very early ages of our history advowsons of rectories appear to have been almost always appendant to some manor. The advowson was part of the manorial property of the lord, who built the church and endowed it with the glebe and most part of the tithes (*k*). The seignories in respect of which he received his rents were another part of his manor, and the remainder principally consisted of the demesne and waste lands, over the latter of which we have seen that his tenants enjoyed rights of common as appendant to their estates (*l*). The incorporeal part of the property, both of the lord and his tenants, was thus strictly appendant or incident to that part which was corporeal; and any conveyance of the corporeal part naturally and necessarily carried with it that part which was incorporeal, unless it were expressly excepted. But, as society advanced, this simple state of things became subject to many innovations, and in various cases the

(*g*) The Act reads one *or* two, but this is clearly an error.
(*h*) Stat. 9 Geo. IV. c. 94, s. 4.
(*i*) Sect. 5.
(*k*) See 1 P. & M. Hist. Eng. Law. 497, 498. 2nd ed.
(*l*) *Ante*, pp. 41, 412.

incorporeal portions of property became severed from the corporeal parts, to which they had previously belonged. Thus we have seen (*m*) that the seignory of lands was occasionally severed from the corporeal part of the manor, becoming a seignory in gross. So rent was sometimes granted independently of the lordship or reversion to which it had been incident, by which means it at once became an independent incorporeal hereditament, under the name of a *rent seek*. Or a rent might have been granted to some other person than the lord, under the name of a *rent charge*. In the same way a *right of common* might have been granted to some other person than a tenant of the manor, by means of which grant a separate incorporeal hereditament would have arisen, as a *common in gross*, belonging to the grantee. In like manner there exist at the present day two kinds of advowsons of rectories: an advowson *appendant* to a manor, and an advowson *in gross* (*n*), which is a distinct subject of property, unconnected with anything corporeal. Advowsons in gross appear to have chiefly had their origin in the severance of advowsons appendant from the manors to which they had belonged; and any advowson, now appendant to a manor, may at any time be severed from it, either by a conveyance of the manor, with an express exception of the advowson, or by a grant of the advowson alone independently of the manor. And when once severed from its manor, and made an independent incorporeal hereditament, an advowson can never become appendant again. So long as an advowson is appendant to a manor, a conveyance of the manor, even by feoffment, and without mentioning the appurtenances belonging to the manor, will be sufficient to comprise the advowson (*o*). But

Origin of advowsons in gross.

Conveyance of an advowson.

(*m*) *Ante*, p. 416.
(*n*) 2 Black. Comm. 22; Litt. s. 617.
(*o*) Perk. s. 116; Co. Litt. 190 b, 307 a. See *A.-G.* v. *Sitwell*, 1 Y. & C. 559; *Rooper* v. *Harrison*, 2 K. & J. 86.

when severed, it must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (*p*).

History of advowsons of vicarages.

The advowsons of rectories were not unfrequently granted by the lords of manors in ancient times to monastic houses, bishoprics, and other spiritual corporations (*q*). When this was the case the spiritual patrons thus constituted considered themselves to be the most fit persons to be rectors of the parish, so far as the receipt of the tithes and other profits of the rectory was concerned; and they left the duties of the cure to be performed by some poor priest as their vicar or deputy. In order to remedy the abuses thus occasioned, it was provided by statutes of Richard II. (*r*), and Henry IV. (*s*), that the vicar should be sufficiently endowed wherever any rectory was thus *appropriated*. This was the origin of vicarages, the advowsons of which belonged in the first instance to the spiritual owners of the appropriate rectories as appendant to such rectories (*t*); but many of these advowsons have since, by severance from the rectories, been turned into advowsons in gross. And such advowsons of vicarages can only be conveyed by deed, like advowsons of rectories under similar circumstances.

Next presentation.

The church must be full.

The sale of an advowson will not include the right to the *next presentation*, unless made when the church is full: that is, before the right to present has actually arisen by the death, resignation or deprivation of the former incumbent (*u*). For the present right to present is regarded as a personal duty of too sacred a character to be bought and sold; and the sale of such a right would fall within the offence of *simony*,—so called from

Simony.

(*p*) Co. Litt. 332 a, 335 b; see Wms. Conv. Stats. 72, 73.
(*q*) 1 Black. Comm. 384.
(*r*) Stat. 15 Rich. II. c. 6.
(*s*) Stat. 4 Hen. IV. c. 12.
(*t*) Dyer, 351 a.
(*u*) *Alston* v. *Atlay*, 7 A. & E. 289.

Simon Magus,—an offence which consists in the buying or selling of holy orders, or of an ecclesiastical benefice (*x*). But formerly, before a vacancy had actually occurred, the next presentation, or right of presenting at the next vacancy, might be sold independently of the future presentations of which the advowson is composed (*y*), and this was frequently done. No spiritual person, however, may sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, any such sale and assignment being void (*z*). And a clergyman was prohibited by a statute of Anne (*a*) from procuring preferment for himself by the purchase of a next presentation; but this statute was held not to prevent the purchase by a clergyman of an estate in fee or even for life in an advowson, with a view of presenting himself to the living (*b*). When the next presentation was sold, independently of the rest of the advowson, it was considered as mere personal property, and would devolve, in case of the decease of the purchaser before he had exercised his right, on his executors, and could not descend to his heir at law (*c*). The advowson itself, it need scarcely be remarked, would descend, on the decease of its owner intestate, to his heir. The law attributes to it, in common with other separate incorporeal hereditaments, as nearly as possible the same incidents as appertain to the corporeal property to which it once belonged. So on the death after the year 1897 of the owner of an advowson, it will devolve, like his fee simple estates in land, to his executors or administrator, on trust, subject to his debts, for his devisee or heir (*d*).

Next presentation.

Next presentation is personal property.

Devolution on death.

(*x*) Bac. Abr. Simony; stat. 31 Eliz. c. 6; 28 & 29 Vict. c. 122. ss. 2, 5, 9.

(*y*) *Fox* v. *Chester*, 6 Bing. 1.

(*z*) Stat. 3 & 4 Vict. c. 113, s. 42.

(*a*) Stat. 12 Anne, st. 2, c. 12, s. 2.

(*b*) *Walsh* v. *Lincoln*, L. R. 10 C. P. 518; *Lowe* v. *Chester*, 10 Q. B. D. 407.

(*c*) See *Bennett* v. *Lincoln*, 7 B. & C. 113; 8 Bing. 490.

(*d*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218—221, 241, 282, 286, 311, 344, 372, 423, 427.

Benefices Act, 1898.

By the Benefices Act, 1898 (*e*) a conveyance or an agreement for conveyance passing any legal or equitable interest *inter vivos* (*f*) in a right of patronage of a benefice shall not be valid unless (1) it is registered as thereby required in the diocesan registry; (2) it transfers the whole interest of the conveying party in the right, and (3) more than twelve months have elapsed since the last institution or admission to the benefice. The second requirement appears to invalidate sales or grants by the owners of an advowson of the next presentation or any less estate or interest than the whole fee simple in the advowson; the only exception admitted being the reservation or limitation in a family settlement of a life interest to the settlor, or in a mortgage the reservation of an equity of redemption (*g*). The Act also prohibits (*h*) the sale by public auction of any right of patronage, except in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the advowson is situate, or in an adjoining parish, and belonging to the same owner as the advowson.

Tithes.

Tithes are another species of separate incorporeal hereditaments, also of an ecclesiastical or spiritual kind. In the early ages of our history, and indeed down to the time of Henry VIII., tithes were exclusively the property of the Church, belonging to the incumbent of the parish, unless they had got into the hands of some monastery, or community of spiritual persons. They never belonged to any layman until the time of the dissolution of monasteries by King Henry VIII.

(*e*) Stat. 61 & 62 Vict. c. 48, s. 1 (1).

(*f*) Not including a transmission on marriage, death, or bankruptcy, or otherwise by operation of law, or a transfer on the appointment of a new trustee where no beneficial interest passes; sect. 1 (6).

(*g*) Sect. 1 (7).

(*h*) Sect. 1 (2). By sect. 1 (3), certain other restrictions are placed on the terms on which an advowson may be sold.

But this monarch having procured Acts of Parliament for the dissolution of the monasteries and the confiscation of their property (*i*), also obtained by the same Acts (*k*) a confirmation of all grants made or to be made by his letters-patent of any of the property of the monasteries. These grants were many of them made to laymen, and comprised the tithes which the monasteries had possessed, as well as their landed estates. Tithes thus came for the first time into lay hands as a new species of property. As the grants had been made to the grantees and their heirs, or to them and the heirs of their bodies, or for term of life or years (*l*), the tithes so granted evidently became hereditaments in which estates might be holden, similar to those already known to be held in other hereditaments of a separate incorporeal nature: and a necessity at once arose of a law to determine the nature and attributes of these estates. How such estates might be conveyed, and how they should descend, were questions of great importance. The former question was soon settled by an Act of Parliament (*m*), which directed recoveries, fines and conveyances to be made of tithes in lay hands, according as had been used for assurances of lands, tenements and other hereditaments. And the analogy of the descent of estates in other hereditaments was followed in tracing the descent of estates of inheritance in tithes. But as tithes, being of a spiritual origin, are a distinct inheritance from the lands out of which they issue, they have not been considered as affected by any particular custom of descent, such as that of gavelkind or borough-English, to which the lands may be subject, but in all cases they descend according to the course of the common law (*n*). From this separate

Tithes in lay hands.

Conveyances of tithes.

Descent of tithes.

(*i*) Stats. 27 Hen. VIII. c. 28; 31 Hen. VIII. c. 13; & 32 Hen. VIII. c. 24.

(*k*) 27 Hen. VIII. c. 28, s. 2; 31 Hen. VIII. c. 13, ss. 18, 19.

(*l*) Stats. 31 Hen. VIII. c. 13, s. 18; 32 Hen. VIII. c. 7, s. 1.

(*m*) Stat. 32 Hen. VIII. c. 7, s. 7.

(*n*) *Doe* d. *Lushington* v. *Llan-*

Tithes exist as distinct from the land.

nature of the land and tithe, it also follows that the ownership of both by the same person will not have the effect of merging the one in the other. They exist as distinct subjects of property; and a conveyance of the land with its appurtenances, without mentioning the tithes, will leave the tithes in the hands of the conveying party (*o*).

Commutation of tithes.

The Acts which have been passed for the commutation of tithes (*p*) affect tithes in the hands of laymen, as well as those possessed by the clergy. Under these Acts a rent charge, varying with the price of corn, has been substituted all over the kingdom for the inconvenient system of taking tithes in kind; and in these Acts provision has been properly made for the

Merger of tithes or rent charge in the land.

merger of the tithes or rent charge in the land, by which the tithes or rent charge may at once be made to cease, whenever both land and tithes or rent charge belong to the same person (*q*).

Remedies for the recovery of a tithe rent charge.

By the Tithe Act, 1891 (*r*), tithe rent charge is recoverable only under an order of the county court of the district, where the lands, out of which it issues, are situate; which order is to be executed by distress and entry, if the lands are occupied by the owner, but in any other case by the appointment of a receiver of the profits. Not more than two years' arrears can be so recovered (*s*). And no one is personally liable to the payment of a tithe

daff. 2 N. R. 491; 1 Eagle on Tithes, 16.

(*o*) *Chapman* v. *Gatcombe*, 2 N. C. 516.

(*p*) Stats. 6 & 7 Will. IV. c. 71; 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 16 & 17 Vict. c. 124; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 93; 36 & 37 Vict. c. 42; 41 & 42 Vict. c. 42; 48 & 49 Vict. c. 32; 49 & 50 Vict. c. 54; 60 & 61 Vict. c. 23.

(*q*) Stats. 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, s. 19.

(*r*) Stat. 54 Vict. c. 8, ss. 2, 9. By s. 1. any contract made between an owner and occupier of lands, after the passing of this Act, for payment of the tithe rent charge by the occupier shall be void. Tithe rent charge was previously recoverable only by distress and entry under stat. 6 & 7 Will. IV. c. 71, ss. 67, 81—85; *Bailey* v. *Badham*, 30 Ch. D. 84.

(*s*) Stat. 6 & 7 Will. IV. c. 71, ss. 81, 82.

rent charge (*t*). Tithe rent charges now pass on the owner's death to his executors or administrator in like manner as his other real estate (*u*).

There are other species of incorporeal hereditaments which are scarcely worth particular notice in a work so elementary as the present, especially considering the short notice that has necessarily here been taken of the more important kinds of such property. Thus, *titles of honour*, in themselves an important kind of incorporeal hereditament, are yet, on account of their inalienable nature, of but little interest to the conveyancer. The same remark also applies to *offices* or places of business and profit. No outline can embrace every feature. Many subjects, which have here occupied but a single paragraph, are of themselves sufficient to fill a volume. Reference to the different works on the separate subjects here treated of must necessarily be made by those who are desirous of full and particular information.

Titles of honour.

Offices.

(*t*) Sect. 67; stat. 54 Vict. c. 8, s. 2 (9).

(*u*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218—221, 241, 282, 286, 311, 314, 372, 423, 427, 433.

PART III.

OF COPYHOLDS

Our present subject is one peculiarly connected with those olden times of English history to which we have had occasion to make so frequent reference. Everything relating to copyholds reminds us of the feudal manor, and the more ancient village community. Estates in copyhold are, however, essentially distinct, both in their origin and in their nature, from those freehold estates which have hitherto occupied our attention.

Definition of copyholds.

Copyhold lands are lands holden by *copy* of court roll: that is, the muniments of the title to such lands are *copies* of the *roll* or book in which an account is kept of the proceedings in the *Court* of the manor to which the lands belong. For all copyhold lands belong to, and are parcel of, some manor. An estate in copyholds is not a freehold; but in construction of law, merely an estate *at the will of the lord* of the manor, at whose will copyhold estates are expressed to be holden. Copyholds are also said to be holden *according to the custom* of the manor to which they belong, for custom is the life of copyholds (*a*).

Origin of copyholds.

Copyhold tenure grew out of tenure in villenage, as has been previously stated (*b*). The early history of tenure in villenage is lost in the obscurity which covers English institutions of early times after the settlement of the invaders from Germany (*c*). *Villenagium*, however,

Villenagium.

(*a*) Co. Cop. s. 32. Tr. p. 58.
(*b*) *Ante*, pp. 27, 41.
(*c*) See 1 Stubbs, Const. Hist. Chap. V.

of which the word *villenage* is an adaptation, means either the tenure or the condition of a *villanus* (*d*). And the word *villanus*, as originally used, merely denoted a member of a *villa*, town or village: a townsman or villager, in fact (*e*). Now the cultivation of land upon the common or open-field system of husbandry by the members of a village community was a feature of English life, which only disappeared within the first half of the last century (*f*). But to trace the origin of this common-field system of cultivation we are carried back to the earliest stages in the history of the occupation of land. A common field in its last stage of development, may be shortly described as a large open field of arable land, divided into long strips which were held in severalty (*g*) by different owners. The field was cultivated in a rotation of crops determined by the rules of the community, which were founded on immemorial custom. The strips were not inclosed. And when the field lay fallow, each owner of a strip of land might put his cattle in to range over the whole field, in virtue of his right of common over the other strips (*h*). The earliest form of common-field husbandry seems to have been the common ploughing of waste land temporarily occupied by a tribal community, whose mode of life was pastoral rather than agricultural, and whose habits were migratory. The cultivation of land by a village community argues a permanent settlement upon the soil, and appears to belong to a later stage of social development (*i*). In our own island we find traces

Villanus.

A common field.

Tribal community.

Village community.

(*d*) In Glanville (lib. 5) *villenagium* is used to denote the condition of a bondman (*natirus*): Bracton uses *villenagium* in the same sense (fo. 6 b), but also uses it to denote a holding in villenage, meaning either the tenure or the land held (see fo. 7, 26, 208 b).

(*e*) See Du Cange, Glossarium, *sub verb.*; Co. Litt. 5 b: *ante*, p. 40 & n. (*y*).

(*f*) See Williams on Commons, 84—102; Seebohm, English Vill. Comm. Chap. I. sect. 4: *ante*, p. 62.

(*g*) *Ante*, p. 140.

(*h*) See *ante*, pp. 41, 411: Williams on Commons, 67: Seebohm, Chap. I. sects. 1—3; Vinogradoff, Vill. in Eng. Essay II. Chap. I.

(*i*) Seebohm, pp. 369, 370.

of the tribal system of cultivation remaining in Wales till after the Norman Conquest (*k*). In England, however, the prevailing form of common-field cultivation seems to be the result of a system in which the cultivators owned their strips each independently of the others rather than of any tribal or communal ownership of land (*l*). But the history of English village communities and of the *maneria* or manors, which we find established in England under the last Saxon kings, and which over a large part of the country were usually coincident with vills (*m*), is too obscure to be discussed in the pages of an elementary law book. We shall therefore take up tenure in villenage in the form which it had assumed after centuries of agriculture at the time of the Norman Conquest. As we have seen (*n*), the Domesday survey discloses a land covered with agricultural estates, each as a rule belonging to some freeholder, and cultivated in common fields by the *villani*, the inhabitants of the *villa* or *manerium* (*o*). As regards personal *status*, the *villanus* of the time of the Conquest appears to have been a free man (*p*); but the conditions on which he held his land, bound him to labour on his lord's demesne (*q*). His holding, it will be remembered, consisted of a house and a certain number of strips of land scattered throughout the common fields of the vill (*r*). He possessed

Tenure in villenage.

(*k*) Seebohm, Chap. VI.

(*l*) Maitland, Domesday Book and Beyond, 337, 338, 346—351.

(*m*) *Ante*, p. 40 & n. (*x*).

(*n*) *Ante*, p. 40.

(*o*) See Seebohm, Chap. III.

(*p*) *Ante*, p. 44; Co. Litt. 5 b; Kemble, Saxons in England, Vol. I. pp. 215, 323; Stubbs, Const. Hist. §§ 37, 132, Vol. I. pp. 78, 426, 2nd ed.; Seebohm, pp. 127, 165; Vinogradoff, Vill. in Eng. 64—69, 135, 188—190, 218, 389. Note that the *Inquisitio Eliensis* (survey of the lands of the monks of Ely) was taken on the oaths "vicecomitis sciræ et omnium baronum et eorum francigenarum et totius centuriatus, presbyteri, præpositi, *ser villani* uniuscujusque villæ;" Domesday, iii. 497; Seebohm, p. 83; Stubbs, Select Charters, p. 86.

(*q*) *Ante*, pp. 42, 50, & n. (*r*).

(*r*) The holding of a *villanus* is very generally found to be a virgate or half a virgate of land. The Latin word *virgata**(a bundle of rods) is used to translate the Saxon term *yardland*.† A virgate or yardland varied in extent; but, on an average, it appears to

* *Virgata.*

† *Yardland.*

this land as the tenant of the owner of the estate, upon the condition of performing the services due in respect of his holding. These services were apparently determined by local custom. They seem generally to have included certain payments in money and in kind: but the *villanus* also had to work for his landlord. He had to plough his landlord's demesne land, and to sow and reap and to mow thereon, according to the time of year; and sometimes he had to do other work, as he was bid. But the amount of work which could be required from a *villanus* was regulated by custom, and seems to have varied a good deal in different places (*s*). Custom, it is thought, must also have controlled the transmission of the holding on the tenant's death (*t*).

Tenure in villenage in the thirteenth century.

Between the eleventh and thirteenth centuries a change appears to have taken place in the constitution of the *manerium*, and the legal position of its inhabitants. As we have seen (*u*), the condition of the mass of the peasantry was depressed as a result of the conquest; and it appears that increased labour services were exacted from them by their Norman landlords (*x*). Then, when it became important to determine what landholders should have their possession protected by the special remedy given in the King's Court (*y*), all the old English forms of landholding were submitted to the classifying action of a general judge-made law. Thus the possession of the free sokemen, whose services were definite in kind and lighter than those of ordinary villagers, was allowed to be their own. So that socage came to be a species of freehold tenure, including all

have comprised thirty acres, *i.e.*, ten scattered acre-strips in each of the three common fields of the vill: see Seebohm, Chap. II. ss. 2—4; Vinogradoff, Villenage. 148—239; Maitland, Domesday Book and Beyond, 385.

(*s*) See *ante*, p. 42 & n. (*c*); Seebohm, Chap. II. ss. 5—12; Chap. V. ss. 2. 4, 6, 7; Vinogradoff, Villenage, pp. 297—300.

(*t*) See Seebohm, pp. 76, 77, 176, 177; *ante*, pp. 19, 20, n. (*c*).

(*u*) *Ante*, p. 44.

(*x*) Maitland, Domesday Book and Beyond, 61—65.

(*y*) *Ante*, pp. 15, 44.

who held by certain but not military service (*z*). But the services incumbent on the ordinary *villanus*, which were partly indefinite in kind and greater in quantity, were held to be servile (*a*); and he was not allowed to claim in the King's Court the possession of his holding as his own (*b*). Tenure in villenage was thus placed outside the pale of property protected by law. By the middle of the thirteenth century, the *manerium* of Domesday has become a feudal manor, of which the most important tenants are the freeholders in knight's service or socage (*c*); while the position of the *villani* is not only degraded by denial of protection in the King's Court, but further complicated with questions of personal *status*. The law of the thirteenth century is stated by Bracton. In his treatise, tenure in villenage, with its labour services, is contrasted with free tenure by military service or in socage; and it appears that the tenant in villenage may be either a free man or a bondman (*d*). The meaning of the word *villanus* has also been modified; and it is used to denote either a tenant in villenage (whether bond or free), or one who is in personal condition a bondman (*e*). Bracton (*f*) describes tenure in

Bracton's account of tenure in villenage.

(*z*) *Ante*, pp. 48—50.

(*a*) *Ante*, p. 44; Vinogradoff, Villenage, 81—83, 215, 216; P. & M. Hist. Eng. Law, i. 337 *sq.*

(*b*) *Ante*, pp. 17 & n. (*p*), 44.

(*c*) *Ante*, pp. 42, 43, 51. It is not clear how this change took place. No doubt it resulted partly from grants of land out of the lord's demesne to be held freely, partly too from the enfranchisement (or grant to be held freely) of land formerly held in villenage. Professor Vinogradoff shows, however, that there are instances of thirteenth century freeholds, of which the origin cannot well be attributed either to grant or enfranchisement. These, he suggests, cannot be explained except as free land, which was originally an integral part of the land tilled by the village. See Vinogradoff, Villenage, Essay II. Chap. IV.; see also pp. 121 *sq.*; Bract. fo. 7, 26 a, 209 a; Britt. liv. 3, chap. 2, §§ 7, 8; stat. *Extenta Manerii*, Statutes of the Realm, i. 242; Seebohm, Chap. III. s. 3; Cartulary of Ramsey Abbey (Rolls ed.), i. 286, 287, 297, 334, 370, 440 (instances of enfranchisement).

(*d*) Bract. fo. 207 a, 208 b. As to the unfree, see P. & M. Hist. Eng. Law, i. 395 *sq.*

(*e*) See Bract. fo. 208 b, where he also uses the word *servus* in speaking of the personal *status* of a bondman; see also fo. 4 b, 6 b; Co. Litt. 5 b. In Glanville (lib. 5) a bondman is called *nativus*.

(*f*) Fo. 7, 26, 208 b.

villenage as being either absolute (*purum*) or privileged. The tenant in absolute villenage holds by uncertain and unlimited services: he has to do what he is bid, may be taxed at the will of the lord, and has to pay the *merchetum*, or fine for the privilege of giving his daughter in marriage. The burthen of the *merchetum* is incident to the *status* of a bondman only, and not to that of a free man. But a free man may hold land in absolute villenage; and in such a case he must perform the services, if he wish to continue in the occupation of his holding. And if a free man paid the *merchetum*, he would pay it as an incident of his tenure, and not of his *status* (*g*). Privileged villenage is to hold land under an agreement with the lord at fixed services of a servile nature, which are determined by the agreement. Either a free man or a bondman can hold in this way. Tenant in villenage holds possession in the name and at the will of his lord, who is seised of land held of him in villenage in his demesne (*h*). If a tenant in villenage be ejected by any other than his landlord, the King's Court does not recognize that he has any right of his own to recover possession of his holding (*i*). If a tenant in absolute villenage be ejected by his landlord, the law, regarding him strictly as tenant at his lord's will, does not recognize that he has any right to recover possession. Still, a free man holding in absolute villenage ought not to be ejected, whilst he performs the customary services. A tenant in privileged villenage of the kind above mentioned acquires by the agreement a right to sue his lord personally, in virtue of which he may possibly recover possession, if ousted by the lord (*k*). Another kind of privileged villenage is the tenure called *villanum socagium*.

Merchetum.

Privileged villenage.

Villanum socagium.

(*g*) Bract. fo. 199 b, 200 a: see *ante*, p. 16 & n. (*i*).

(*h*) Bract. fo. 263 a: *ante*, p. 36, n. (*c*).

(*i*) Bract. fo. 7 a, 26 b, 168 a, 190, 197 b, 207 a, 208 b, 210 b, 273 b.

(*k*) Bract. fo. 24 b, 26 b, 168 b, 190, 199 b, 200 a, 208 b, 209 a. See Vinogradoff, Villenage, 70—74, 77—81.

socagium, which is the tenure of those who hold land of manors in the ancient demesne of the Crown (*l*) by fixed services of a servile nature. Such tenants cannot be ejected, so long as they perform their services; nor can they be compelled to remain in the occupation of their holdings, and therefore they are called free. But their possession is not protected in the King's Court, but only by a special royal writ in the manorial court. And they cannot alien their tenements by gift (*m*), or transfer them to others, any more than bondmen can; and therefore if their holdings are to be transferred, they surrender them to the lord or his steward, who delivers them to others to hold in villenage.

Actual position of tenant in villenage in thirteenth century.

Practically, however, the tenant in absolute villenage of the thirteenth century was placed in a more favourable position than was accorded to him by King's Court law. In everyday life the will of the lord was, as a rule, controlled by custom. And what is more, the humblest villager had some security against the invasion of his customary rights in the manorial court, of which the findings were originally those of the whole body of villagers, whether bond or free (*n*). Thus the services required of the tenant in villenage were those accustomed to be rendered in respect of his holding; and these were described, with extreme minuteness, in the manorial extents or surveys, which were drawn up for the guidance of the lord, but on the evidence of the villagers themselves (*o*). The possession of a tenant in villenage appears to have been protected in the manorial court against all persons other than the lord (*p*). And in many cases the lords submitted to

(*l*) *Ante*, p. 60.
(*m*) See *ante*, p. 115.
(*n*) Maitland. Select Pleas in Manorial Courts (Selden Society, vol. 2), Introd. lx. *sq.*, 163, 164; Vinogradoff. Villenage, Essay II. Chap. V.; Selden Society, iv. 110; P. & M. Hist. Eng. Law, i. 580—582.
(*o*) Vinogradoff. Villenage, 212—215, 278, 297—300, 355.
(*p*) *Ante*, p. 17, n. (*p*).

such dealings with lands holden of them in villenage as showed or founded a custom of hereditary succession to the tenancy, or alienation by the tenant (*q*).

Growth of the law of copyhold tenure.

The law of copyhold tenure seems to have grown up as the customs, which regulated the holding of land in villenage, developed into rights, and personal bondage died out. Copyhold tenure appears to have gained ground with progress varying according to the customs and circumstances of particular manors and districts. Commutation of the labour services for money rents was doubtless one of the chief causes of the change from tenure in villenage to copyhold tenure; and this commutation appears to have been made at different periods in different parts of the country (*r*). The tenure came to be called copyhold, because the tenants had no other evidence of title, save copies of the Court rolls (*s*). For the customs relating to the holdings of the tenants in villenage were proved by the entries made in the rolls, which formed the records of the proceedings of the manorial court (*t*). These records are the Court rolls, which alone can furnish evidence of the custom, by virtue of which the copyholder claims his estate; and copies of the entries made therein were given to the tenants and kept by them as muniments of title (*u*). Originally, as we have seen, the whole village community was represented in one manorial court (*x*). But according to later law (*y*), the Court Baron of a manor, in which the freeholders were suitors and

Court rolls

(*q*) Vinogradoff, Villenage, 165—167. 172; Rot. Hund. ii. 403. 669. 768. 770. 771; Ramsey Cartulary (Rolls Series), i. 372, 411. 416, 432, 477.

(*r*) Vinogradoff, Villenage, 139. 167—172, 178—188, 216, 306—310.

(*s*) Litt. s. 75.

(*t*) See Seebohm's account of the Court Rolls of the Manor of Windslow during the reign of Edward III.; Eng. Vill. Community, pp. 20—32; Vinogradoff, Villenage, 173, 374; Selden Society, iv. 112.

(*u*) Co. Litt. 58 a.

(*x*) *Ante*, p. 444.

(*y*) Co. Litt. 58 a; 2 Wat. Cop. 4. 5; 1 Scriv. Cop. 5, 6, 3rd ed.

judges (*z*), is distinguished from the Court held for the customary tenants; the latter being called a Customary Court, and the lord only, or his steward, being judge therein.

Customary Court.

Littleton's account of copyhold tenure and villenage.

Littleton, who wrote in the reign of Edward IV., describes (*a*) tenant by copy of Court roll as holding lands in fee simple, fee tail, or for life at the will of the lord, according to the custom of the manor, in virtue of an immemorial custom within that manor, that lands should be so held. He shows how such tenants may have estates of inheritance by the custom, though they have no freehold at common law (*b*); and describes the manner in which it is customary for them to alienate their holdings (*c*). Littleton, however, also mentions (*d*) tenure in villenage as being most properly when a villein holdeth of a lord, to whom he is a villein, certain lands according to the custom of the manor, or otherwise, at the will of the lord, and to do to his lord villein service, as to carry out the dung of his lord and spread it on the lord's land, and such like. And he says that some free men hold their tenements according to the custom of certain manors by such services; and their tenure is also called tenure in villenage, and yet they are not villeins; for no land holden in villenage, or villein land, nor any custom arising out of the land, shall ever make a free man villein. It appears from this passage, that in Littleton's time the word *villanus* or villein had almost entirely lost its old meaning (*e*), and was generally used to signify a bondman (*f*). It may also be inferred from

(*z*) *Ante*, pp. 45, 48.
(*a*) Sect. 73.
(*b*) Sects. 76, 77, 81, 82.
(*c*) Sects. 74, 78, 79.
(*d*) Sect. 172.
(*e*) See *ante*, pp. 439, 442.
(*f*) Littleton (sects. 181—183) describes villeins as being either *regardant* or *in gross*. Villeins regardant were annexed to a manor, and were passed by a conveyance thereof: for the transfer of villeins in gross a deed was always required. It may be interesting to the student of analytical jurisprudence to note that a villein was a purely incorporeal hereditament; see Litt. sects.

Villeins regardant or in gross.

Littleton's treatise that, in his time, copyhold tenure had partially, but not altogether, superseded tenure in villenage. With the extinction of personal bondage after Littleton's day (*g*), the term *tenure in villenage* seems to have become obsolete; and the tenure itself has survived only in the form of copyhold tenure.

Copyhold estates.

The estates for which land may be holden in copyhold tenure, and the modes of alienation thereof and succession thereto, are the outgrowth of local customs, which in many cases are doubtless of great antiquity (*h*). In these matters the law is now determined by the custom of each particular manor. In those manors, in which it was the custom that the heir of a tenant in villenage should be admitted to succeed to his ancestor's holding, the interest of the copyholders developed into customary *estates* of inheritance analogous to freehold estates. Such estates descend, not to the heirs at common law, but to the customary heirs (*i*); that is, to those relations of a deceased tenant, who by the custom of the manor have from time immemorial been admitted to succeed to his holding as his heirs. Sometimes the customary course of descent is analogous to the course of descent prescribed by law in the case of freeholds. But in many cases quite a different course of descent is prescribed by the custom of the manor (*k*). The memory of the time when the tenant's heir was admitted to succeed by virtue of a custom only, and not as of right, is preserved by the fine, which the lord is generally entitled to exact on the heir's admission. And the form

Copyholds of inheritance.

175, 181—185; Co. Litt. 121 b; P. & M. Hist. Eng. Law, ii. 145, 146: *ante*, p. 409.

(*g*) See 3 Hallam, Midd. Ages, 271; Smyth. De Republica Anglorum, 107, 108, ed. 1583; Doctor & Student, Dial. II. Chap. XVIII.

(*h*) See Pollock, Land Laws, App. C.; Elton, Origins of English History, Chap. VIII.; Elton, Custom and Tenant Right, App. D.

(*i*) *Doe* d. *Garrod* v. *Garrod*, 2 B. & Ad. 87.

(*k*) See 2 Wat. Cop. App. III., 4th ed.; *Re Smart*, 18 Ch. D. 165.

of transfer by favour of the lord is also preserved in the mode of alienation of such estates: for the copyholder cannot convey his estate directly to another, but must *surrender* his holding to his lord, who will then *admit* the alienee to be his tenant at the customary services on payment of the customary fine (*l*).

Copyholds for lives, &c.

In the Midland and South-Eastern counties the prevailing customs have admitted of copyhold estates of inheritance analogous to freehold estates. But in some manors within those counties, and in other parts of the country (*m*), the copyhold tenant is admitted to hold for his own life only, or for the lives of himself and another or others, or for a term of years only. In such cases, he may, by virtue of an immemorial custom, have the right either to nominate his successor, or to renew the lives or the term on payment of a certain fine: but otherwise he will have no right of renewal (*n*).

Progress of the development of copyholders' rights.

It was long before the estates of copyholders were secured to them by clearly defined rights, which could be enforced in the King's Courts (*o*), instead of by custom. In the reign of Edward III. a case occurred in which the entry of a lord on a tenant by copy of Court roll was adjudged lawful, because the tenant did not do his services, by which he broke the custom of the manor (*p*). This seems to shew that the lord could not, at that time, have ejected his tenant without cause (*q*). In the reign of Henry VI. it was said that a tenant by copy of Court roll should have a remedy in Chancery

(*l*) Litt. s. 74; see Vinogradoff, Villenage in England, 371 *sq.*

(*m*) Chiefly in the West of England.

(*n*) See 1 Scriv. Cop. 422—427, 3rd ed.: Wat. Cop. 4th ed. Vol. I. pp. 62, n., 71, n., 122, n., 372—374; Vol. II. p. 214, n., and App. III.; Elton, Custom and Tenant Right, pp. 31, 32, 63—72, and App. C.

(*o*) *Ante*, p. 9 & n. (*e*).

(*p*) Y. B. 42 Edw. III. 25. pl. 9.

(*q*) 4 Rep. 21 b.

against his lord who ousted him (*r*). And in the reign of Edward IV. the right of the copyholder to enjoy his customary estate, as against his lord, was struggling into definite recognition at law. For Littleton says that the lord cannot break the custom, by which the copyhold tenant enjoys his estate (*s*), and may in some case be barred by the custom in an action of trespass against him (*t*). While other judges suggested that a copyholder might have an action of trespass against a lord who unjustly deprived him of possession (*u*). These opinions ultimately prevailed (*x*).

As against other persons than the lord, the estate of the copyholder seems to have been earlier secured to him, as of *right*. But he was not protected by the King's writ, for he could only assert his rights in the lord's Court by proceedings in the nature of real actions according to the custom of the manor (*y*). And he could not appeal from the judgment of the lord to the King's Courts of law; but his only remedy against the false judgment of the lord was in the nature of a petition in Chancery (*z*). Copyholders' rights were finally secured in the reign of Elizabeth, when it was decided (*a*) that a copyholder might recover possession of his holding, from his lord as well as from a stranger, in an action of ejectment, which he could bring at common law. For this action was in form

(*r*) Fitz. Abr. Subpœna, pl. 21; *Andrews* v. *Hulse*, 4 K. & J. 392.

(*s*) Litt. ss. 77 (of which the latter half is of doubtful authenticity), 82—84, 137.

(*t*) Sect. 82.

(*u*) Y. B. 7 Edw. IV. 18, pl. 16; 21 Edw. IV. 80, pl. 27.

(*x*) Co. Cop. s. 9; Bac. Uses, 20.

(*y*) See *ante*, p. 444; 13 Ric. II. Fitz. Abr. Faux Judgment. pl. 7; Y. B. 2 Hen. IV. 12, pl. 49; 1 Hen. V. 11, pl. 24; 4 Rep. 21 b; Litt. s. 76; 1 Scriv. Cop. 562 *sq.* 3rd ed.

(*z*) See Fitz. Abr. *ubi sup.*; Y. B. 14 Hen. IV. 34, pl. 51; 4 Rep. 30 b; *Puttishul's case*, 4 Vin. Abr. 385; *Edwards's case*, Lane, 98; *Ash* v. *Rogle*, 1 Vern. 367; Co. Litt. 60 a; 1 Scriv. Cop. 582, 3rd ed.

(*a*) *Melwich* v. *Luter*, 4 Rep. 26 a; see 1 Scriv. Cop. 553 *sq.* 3rd ed.

founded upon a *lease* for a year made by the copyholder, which was good at common law, and the *ejectment* of the lessee after entry (*b*).

Copyhold estates thus acquired the essential quality of ownership; and, as we have seen, are now included in what is called real property, as well as freeholds (*c*).

(*b*) *Ante*, p. 64. n. (*g*). (*c*) *Ante*, p. 28.

CHAPTER I.

OF ESTATES IN COPYHOLDS.

With regard to the estates which may be holden in copyholds, in strict legal intendment a copyholder can have but one estate; and that is an estate at will, the smallest estate known to the law, being determinable at the will of either party. For though custom has now rendered copyholders independent of the will of their lords, yet all copyholds, properly so called, are still expressly stated, in the Court rolls of manors, to be holden at the will of the lord (*a*): and, more than this, estates in copyholds are still liable to some of the incidents of a mere estate at will. We have seen that in the thirteenth century the occupants of land in villenage, however much they may have been protected from disturbance by force of custom, were regarded by the law of the King's Court as mere tenants at the will of the freeholder of a manor, having no independent right of their own to the possession of their holdings; and further that it was considered that the lord was seised in his demesne of all land occupied by his tenants in villenage (*b*). In other words, the lands held by such tenants, who afterwards came to be called copyholders, still remained part and parcel of the lord's manor; and the freehold of these lands still continued vested in the lord. And this is the case at the present day with regard to all copyholds. The lord of the manor is actually seised of all the lands in the

Estates in copyholds.

An estate at will.

The lord is actually seised of all

(*a*) 1 Watk. Cop. 44. 45: 1 Scriv. Cop. 605.

(*b*) *Ante*, p. 143.

the copyhold lands of his manor.

possession of his copyhold tenants (*c*). He has not a mere incorporeal seignory over these as he has over his freehold tenants, or those who hold of him lands, once part of the manor, but which were anciently granted to be held for estates in fee simple by free tenure (*d*). Of all the copyholds he is the feudal possessor; and the seisin he thus has is not without its substantial advantages. The lord having a legal estate in fee simple in the copyhold lands, possesses all the rights incident to such an estate (*e*), controlled only by the custom of the manor, which is now the tenant's safeguard. Thus he possesses a right to all *mines* and *minerals* under the lands (*f*), and also to all *timber* growing on the surface, even though planted by the tenant (*g*). These rights, however, are somewhat interfered with by the rights which custom has given to the copyhold tenants: for the lord cannot come upon the lands to open his mines, or to cut his timber, without the copyholder's leave. And hence it is that timber is so seldom to be seen upon lands subject to copyhold tenure (*h*). Again, if a copyholder should grant a lease of his copyhold lands, beyond the term of a year, without his lord's consent, such a lease would be a cause of forfeiture to the lord, unless it were authorized by a special custom of the manor (*i*). For such an act would be imposing on the lord a tenant of his own lands, without the authority of custom; and custom alone is the life of all copyhold assurances (*k*). So a copyholder must not commit any

The lord has a right to mines and timber.

Lease of copyholds.

(*c*) Watk. Descents. 51 (59. 4th ed.).

(*d*) *Ante*, p. 410.

(*e*) *Ante*, p. 64.

(*f*) 1 Watk. Cop. 333; 1 Scriv. Cop. 25, 508. See *Bowser* v. *Maclean*, 2 De G. F. & J. 415; *Eardley* v. *Granville*, 3 Ch. D. 826.

(*g*) 1 Watk. Cop. 332; 1 Scriv. Cop. 499.

(*h*) There is a common proverb, "The oak scorns to grow except on free land." It is certain that in Sussex and in other parts of England the boundaries of copyholds may be traced by the entire absence of trees on one side of a line, and their luxuriant growth on the other: 3rd Rep. of Real Property Commissioners, p. 15.

(*i*) 1 Watk. Cop. 327; 1 Scriv. Cop. 544; *Doe* d. *Robinson* v. *Bousfield*, 6 Q. B. 492.

(*k*) By the licence of his lord a copyholder may grant a lease

waste either voluntary, by opening mines, cutting down timber or pulling down buildings, or permissive, by neglecting to repair. For the land, with all that is under it or on it, belongs to the lord: the tenant has nothing but a customary right to enjoy the occupation; and if he should in any way exceed this right, a cause of forfeiture to his lord would at once accrue (*l*). Copyholders are thus placed in a far less advantageous position than freeholders as regards the right of free enjoyment (*m*). Waste.

A peculiar species of copyhold tenure prevails in the north of England, and is to be found also in other parts of the kingdom, particularly within manors of the tenure of ancient demesne (*n*); namely, a tenure by copy of Court roll, but not expressed to be at the will of the lord. The lands held by this tenure are denominated customary freeholds. This tenure has been the subject of a great deal of learned discussion (*o*); but the Courts of law have now decided that as to these lands, as well as pure copyholds, the freehold is in the lord, and not in the tenant (*p*). Customary freeholds afford another Customary freeholds. The freehold is in the lord.

for any term warranted by the licence. Such a lease takes effect at common law out of the seisin of the freeholder of the manor, who cannot, therefore, authorize a longer lease than is warranted by his own estate in the manor, or some *power* given to him by a settlement or by statute. By the Settled Land Act, 1882 (stat. 45 & 46 Vict. c. 38, s. 14), a tenant for life under a settlement may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land (*ante*, p. 119). By the Copyhold Act, 1894, a lord may, notwithstanding any custom to the contrary, give a licence to a tenant to alienate his ancient copyhold tenement, or any part thereof, by devise, sale, exchange or mortgage; stat. 57 & 58 Vict. c. 46, s. 86. Lease of copyholds by licence of the lord.

(*l*) 1 Watk. Cop. 331; 1 Scriv. Cop. 526. See *Doe* d. *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507; *Blackmore* v. *White*, 1899, 1 Q. B. 293.

(*m*) *Ante*, pp. 2, 79.

(*n*) Britt. 164 b, 165 a. See *ante*, p. 60.

(*o*) 2 Scriv. Cop. 665.

(*p*) *Stephenson* v. *Hill*, 3 Burr. 1273; *Burrell* v. *Dodd*, 3 Bos. & Pul. 378; *Doe* d. *Reay* v. *Huntington*, 1 East, 271; *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Thompson* v. *Hardinge*, 1 C. B. 940.

instance of the classifying action of a general law imposed on tenures of different origin and history (*q*). On manors of ancient demesne, customary tenants, who have not the freehold, appear to be the successors of former tenants in pure villenage: a class found on the ancient demesne of the Crown, as well as those who hold by the privileged villein tenure called *villanum socagium* (*r*). The tenures of the North have a history of their own (*s*). And the so-called customary freeholders of the Northern counties appear to be the successors of those who, before the union of England and Scotland, held land by doing services for the protection of the border (*t*), and to whom long custom had secured an acknowledged tenant-right in their holdings (*u*). On lands held by copy of Court roll, though not expressly at the will of the lord, the right to mines and timber belongs to the lord in the same manner as on other copyhold lands (*x*). Neither can the tenants generally grant leases without the lord's consent (*y*). The lands are, moreover, said to be *parcel* of the manors of which they are held, denoting that in law they belong, like other copyholds, to the lord of the manor, and are not merely *held of* him, like the estates of the freeholders (*z*). In law, therefore, the estates of these tenants cannot, in respect of their lords, be regarded as any other than estates at

(*q*) *Ante*, pp. 15, 44, 52.

(*r*) *Ante*, pp. 61 & n. (*b*), 443; Bract. fo. 7, 209 a; Britt. liv. 3, ch. 2, §§ 11, 12; F. N. B. 12, 14; Vinogradoff. Vill. in Eng. 112—122.

(*s*) See Maitland. Northumbrian Tenures. Eng. Hist. Review, v. 625.

(*t*) See Nicholson's Border Laws, xxxiii. and App. No. 3.

(*u*) Co. Cop. s. 32; Moore, 588; *Champian* v. *Atkinson*, 3 Keb. 90; *Duke of Somerset* v. *France*, Stra. 654, 657; *Doe* d. *Reay* v. *Huntington*, 4 East, 288; *Brown* v. *Rawlins*, 7 East, 409, 8 R. R. 652; *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765.

(*x*) 3 Burr. 1277, arguendo; *Doe* d. *Reay* v. *Huntington*, 4 East, 271, 273; *Brown* v. *Rawlins*, 7 East, 409, 8 R. R. 652; *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765.

(*y*) *Doe* v. *Danvers*, 7 East, 299, 301, 314.

(*z*) *Burrell* v. *Dodd*, 3 Bos. & Pul. 378, 381; *Doe* v. *Danvers*, 7 East, 320, 321.

will, though this is not now actually expressed. If there should be any customary freeholds in which the above characteristics, or most of them, do not exist, such may with good reason be regarded as the actual freehold estates of the tenants. The tenants would then possess the rights of other freeholders in fee simple, subject only to a customary mode of alienation. That such a state of things may, and in some cases does, exist, is the opinion of some very eminent lawyers (*a*). But a recurrence to first principles seems to show that the question, whether the freehold is in the lord or in the tenant, is to be answered, not by an appeal to learned *dicta* or conflicting decisions, but by ascertaining in each case whether the well-known rights of freeholders, such as to cut timber and dig mines, are vested in the lord or in the tenant.

Freehold in the tenant.

It appears then, that with regard to the lord, a copyholder is only a tenant at will. But a copyholder, who has been admitted tenant on the Court rolls of a manor, stands, with respect to other copyholders, in a similar position to a freeholder who has the seisin. The legal estate in the copyholds is said to be *in* such a person in the same manner as the legal estate of freeholds belongs to the person who is seised. The necessary changes which are constantly occurring of the persons who from time to time are tenants on the rolls, form occasionally a source of considerable profit to the lords. For by the

Copyholders, when admitted, in a similar position to freeholders having the seisin.

(*a*) Sir Edward Coke, Co. Litt. 59 b; Co. Cop. sect. 32, Tracts, p. 58; Sir Matthew Hale, Co. Litt. 59 b, n. (1); Sir W. Blackstone. Considerations on the Question, &c.; Sir John Leach, *Bingham* v. *Woodgate*, 1 Russ. & My. 32; 1 Tamlyn. 138. Tenements within the limits of the ancient borough of Kirby-in-Kendal, in Westmoreland, appear to be an instance; *Busher*, app., *Thompson*, resp., 4 C. B. 48. The freehold is in the tenants, and the customary mode of conveyance has always been by deed of grant, or bargain and sale without livery of seisin, lease for a year, or inrolment. Some of the judges, however, seemed to doubt the validity of such a custom. See also *Perryman's case*, 5 Rep. 84; *Passingham*, app., *Pitty*, resp., 17 C. B. 299; *Wadmore* v. *Tollar*, 6 Times L. R. 58.

Fines.

customs of manors, on every change of tenancy, whether by death or alienation, fines of more or less amount become payable to the lord. By the customs of some manors the fine payable was anciently arbitrary; but in modern times, fines, even when arbitrary by custom, are restrained to two years' improved value of the land after deducting quit-rents (*b*). Occasionally a fine is due on the change of the lord; but, in this case, the change must be by the act of God and not by any act of the party (*c*).

Customary estates analogous to freehold.

The tenants on the rolls, when once admitted, hold customary estates analogous to the estates which may be holden in freeholds (*d*). These estates of copyholders are only *quasi* freeholds; but as nearly as the rights of the lord and the custom of each manor will allow, such estates possess the same incidents as the freehold estates of which we have already spoken. Thus

Estate for life.

there may be copyhold estates in fee simple, in tail, or for life only; and some manors admit of no other than life estates, the lives being continually renewed as they drop (*e*). And in those manors in which estates of inheritance are allowed, a grant to a man simply, without expressly extending the benefit thereof to his heirs, will confer only a customary estate for his life (*f*). But, as the customs of manors are very various, in some manors the words "to him and his," or "to him and his assigns," or "to him and his sequels in right," will create a customary estate in fee simple, although the word *heirs* (or the words *in fee simple* after the year 1881) may not be used (*g*).

Estate in fee simple

The same free and ample power of alienation, which belongs to an estate in fee simple in freehold lands, appertains also to the like estate in copyholds. The liberty

(*b*) 1 Scriv. Cop. 384.
(*c*) 1 Watk. Cop. 285.
(*d*) See *ante*, p. 447.
(*e*) See *ante*, p. 448.
(*f*) Co. Cop. s. 49. Tr. p. 114. See *ante*, pp. 110, 145, 182, 202.
(*g*) 1 Watk. Cop. 109: see *ante*, pp. 145, 202.

of alienation *inter vivos* appears, as to copyholds, to have had little, if any, precedence, in point of time, over the liberty of alienation by will. Both were, no doubt, at first secured merely by local custom, which subsequently ripened into a right (*h*).

Estate tail in copyholds.

An estate tail in copyholds stands upon a peculiar footing, and has a history of its own, which we shall now endeavour to give (*i*). This estate, it will be remembered, is an estate given to a man and the heirs of his body. With regard to freeholds, we have seen that, in an early period of our history, a right of alienation appears gradually to have grown up, empowering every freeholder, to whose estate there was an expectant heir, to disinherit such heir, by gift or sale of the lands. A man, to whom lands had been granted to hold to him and the heirs of his body, was accordingly enabled to alien the moment a child or expectant heir of his body was born to him: and this right of alienation at last extended to the possibility of reverter belonging to the lord, as well as to the expectancy of the heir (*k*); till at length it was so well established as to require an Act of Parliament for its abolition. The Statute *De donis* (*l*) accordingly restrained all alienation by tenants of lands which had been granted to themselves and the heirs of their bodies: so that the lands might not fail to descend to their issue after their death, or to revert to the donors or their heirs if issue should fail. This statute was passed avowedly to restrain that right of alienation, of the prior existence of which the statute itself is the best proof. And this right, in respect of fee simple estates, was soon afterwards acknowledged and confirmed by the Statute of *Quia*

The Statute *De donis*.

(*h*) Litt. ss. 73—84: Co. Litt. 59: 1 Scriv. Cop. 151, 175, 176, 264, 319: Vinogradoff. Vill. in Eng. 166, 172, 173, 371—378.

(*i*) The attempt here made to explain the subject is grounded on the authorities and reasoning of Mr. Serj. Scriven (1 Scriv. Cop. 67 *sq.*). Mr. Watkins sets out with right principles, but seems strangely to stumble on the wrong conclusion (1 Watk. Cop. chap. 4).

(*k*) *Ante*, pp. 91, 92.

(*l*) 13 Edw. 1. c. 1; *ante*, p. 92.

Tenants in villenage anciently in a very different state from freeholders.

emptores (*m*). But during all this period, tenants in villenage were in a very different state from the freeholders, who were the objects of the above statutes (*u*). Tenants in villenage were generally bound to labour on their lord's demesne, as the condition of remaining in the occupation of their holdings; and they were often in a state of personal bondage (*o*). Copyhold estates, however customary, were not fully recognized as rights, when the right of alienation was established in the case of freeholds (*p*). The right of an ancestor to bind his heir (*q*), with which right, as we have seen (*r*), the power to alienate freeholds commenced, never belonged to a copyholder (*s*). And, until the year 1833, copyhold lands in fee simple descended to the customary heir, quite unaffected by any bond debts of his ancestor by which the heir of his freehold estates might have been bound (*t*). It would be absurd, therefore, to suppose that the right of alienation of copyhold estates arose in connexion with the right of freeholders. The two classes were then quite distinct. The one were poor and neglected, the other powerful and consequently protected (*u*). The one were considered to hold their tenements at the will of their lords; the other maintained a right of alienation in spite of them. The one had no other security than was afforded by the force of

(*m*) 18 Edw. I. c. 1.

(*n*) See *ante*, pp. 40, 41, 411—447. In the preamble of the Statute *De donis*, the tenants are spoken of as *feoffees*, and as able by deed and *feoffment* to bar their donors, showing that freeholders only were intended. And in the statute of *Quia emptores* freemen are expressly mentioned.

(*o*) See *ante*, pp. 441—447.

(*p*) See *ante*, p. 442.

(*q*) *Ante*, p. 273.

(*r*) *Ante*, pp. 67—69.

(*s*) *Eylet* v. *Lane and Pers*, Cro. Eliz. 380.

(*t*) 4 Rep. 22 a.

(*u*) The famous provision of Magna Charta, c. 29,—"Nullus *liber* homo capiatur vel imprisonetur aut dissesiatur de aliquo libero tenemento suo, &c., nisi per legale judicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel justiciam." — whatever classes of persons it may have been subsequently construed to include— plainly points to a distinction then existing between free and not free. Why else should the word *liber* have been used at all?

local custom: the other could appeal to the laws of the realm.

Now, with regard to an estate given to a copyholder and the heirs of his body, the lords of different manors appear to have acted differently,—some of them permitting alienation on issue being born, and others forbidding it altogether. And from this difference appears to have arisen the division of manors, in regard to estates tail, into two classes, namely, those in which there is no custom to entail, and those in which such a custom exists. In manors in which there is no custom to entail, a gift of copyholds, to a man and the heirs of his body, will give him an estate analogous to the fee simple conditional which a freeholder would have acquired under such a gift before the passing of the Statute *De donis* (*x*). Before he has issue, he will not be able to alien; but after issue are born to him, he may alienate at his pleasure (*y*). In this case the right of alienation appears to be of a very ancient origin, having arisen from the liberality of the lord in permitting his tenants to stand on the same footing in this respect as freeholders then stood.

As to manors where there is no custom to entail.

Alienation was anciently allowed.

But, as to those manors in which the alienation of the estate in question was not allowed, the history appears somewhat different. The estate, being inalienable, descended, of course, from father to son, according to the customary line of descent. A perpetual entail was thus set up, and a custom to entail established in the manor. But in process of time the original strictness of the lord defeated his own end. For the evils of such an entail, which had been felt as to freeholds after the passing of the Statute *De donis* (*z*), became felt also as

When alienation was not allowed.

A custom to entail was established.

(*x*) *Ante*, pp. 90, 91; *Doe* d. *Blesard* v. *Simpson*, 1 New Cases, 333, 3 Man. & Gr. 929; *Pemberton* v. *Barnes*, 1899, 1 Ch. 544.

(*y*) *Doe* d. *Spencer* v. *Clark*, 5 B. & A. 158, 24 R. R. 257.

(*z*) *Ante*, p. 93.

to copyholds (*a*). And, as the copyholder advanced in importance, different devices were resorted to for the purpose of effecting a bar to the entail; and in different manors, different means were held sufficient for this purpose. In some, a customary recovery was suffered, in analogy to the common recovery, by which an entail of freeholds had been cut off (*b*). In others, the same effect was produced by a preconcerted forfeiture of the lands by the tenant, followed by a re-grant from the lord of an estate in fee simple. And in others, a conveyance by surrender, the ordinary means, became sufficient for the purpose; and the presumption was, that a surrender would bar the estate tail until a contrary custom was shown (*c*). Thus it happened that in all manors, in which there existed a custom to entail, a right grew up, empowering the tenant in tail, by some means or other, at once to alienate the lands. He thus ultimately became placed in a better position than the tenant to him and the heirs of his body in a manor where alienation was originally permitted. For, such a tenant can now only alienate after he has had issue. But a tenant in tail, where the custom to entail exists, need not wait for any issue, but may at once destroy the fetters by which his estate has been attempted to be bound.

Customary recovery.

Forfeiture and re-grant.

The Fines and Recoveries Act, 1833 (*d*), contains provisions applicable to entails of copyholds as well as of freeholds. Instead of the cumbrous machinery of a customary recovery or of a forfeiture and re-grant, it substitutes, in every case, a simple conveyance by surrender (*e*), the ordinary means for conveying a customary estate in fee simple. When the estate tail is in remainder, the necessary consent of the protector (*f*) may be given, either by deed, to be entered

Entails now barred by surrender.

(*a*) 1 Scriv. Cop. 70.
(*b*) *Ante*, p. 96.
(*c*) *Gould* v. *White*, Kay, 683.
(*d*) Stat. 3 & 4 Will. IV. c. 74.
ante, p. 98.
(*e*) Sect. 50.
(*f*) See *ante*, p. 102.

on the Court rolls of the manor (*g*), or by the concurrence of the protector in the surrender, in which case the memorandum or entry of the surrender must expressly state that such consent has been given (*h*).

Estate *pur autre vie* in copyholds.

It will be remembered that, anciently, if A., a freeholder for life, granted his land to B. simply, without mentioning his heirs, and B. died first, the first person who entered after the decease of B. might lawfully hold the lands during the residue of the life of A. (*i*). And this general occupancy was abolished by the Statute of Frauds. But copyhold lands were never subject to any such law (*k*). For the seisin or feudal possession of all such lands belongs, as we have seen (*l*), to the lord of the manor, subject to the customary rights of occupation belonging to his tenants. In the case of copyholds, therefore, the lord of the manor after the decease of B. would, until lately, have been entitled to hold the lands during the residue of A.'s life: and the Statute of Frauds had no application to such a case (*m*). But now, by the Wills Act of 1837 (*n*), the testamentary power is extended to copyhold or customary estates *pur autre vie* (*o*); and the same provision, as to the application of the estate by the executors or administrators of the grantee, as is contained with reference to freeholds (*p*), is extended also to customary and copyhold estates (*q*). The grant of an estate *pur autre vie* in copyholds may, however, be extended, by express words, to the heirs of the grantee (*r*). And in this event the heir will, in case of intestacy, be entitled to hold during the residue of the life of the *cestui que vie*, subject to

(*g*) Sect. 51.
(*h*) Sect. 52.
(*i*) *Ante*, p. 130.
(*k*) *Doe* d. *Foster* v. *Scott*, 4 B. & C. 706; 7 Dow. & Ryl. 190.
(*l*) *Ante*, p. 452.
(*m*) 1 Scriv. Cop. 63, 108; 1 Watk. Cop. 302.
(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26.
(*o*) Sect. 3.
(*p*) *Ante*, p. 131.
(*q*) Sect. 6.
(*r*) 1 Scriv. Cop. 64; 1 Watk. Cop. 303.

the debts of his ancestor the grantee (*s*). As we shall see (*t*), all legal estates in copyholds remain unaffected by the provisions of the Land Transfer Act, 1897, under which real estate now devolves upon the personal representatives.

Alienation for debt.

Until the year 1833, copyhold lands were not liable to be taken to satisfy the tenant's debts (*u*), except in the event of his bankruptcy, to which traders only were then liable (*x*). And the Crown had no further privilege than any other creditor (*y*). But in 1833 customaryhold and copyhold estates in fee simple were made *assets* for the payment of all the debts of the deceased tenant, as well as his freeholds (*z*). Still copyholds could not be taken in execution of a judgment against the tenant until 1838; when the Judgments Act of that year enabled the sheriff to deliver execution, under the writ of *elegit*, of lands of copyhold or customary tenure, as well as of freehold lands (*a*). By the same Act judgments were made a charge on the debtor's lands of copyhold or customary tenure (*b*); though not as against purchasers, unless duly registered (*c*). But purchasers of copyholds, without notice of any judgment affecting them, appear to be protected by the clause in a subsequent Act (*d*), which provides that, as to purchasers without notice, no judgment shall bind any lands otherwise than it would have bound such purchasers under the old law. And the Acts of 1860, 1864, 1888, and 1900, which further

(*s*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 6.

(*t*) *Post*, p. 463.

(*u*) 4 Rep. 22 a: 1 Watk. Cop. 140: 1 Scriv. Cop. 60.

(*x*) *Ante*, pp. 28, n. (*c*), 272.

(*y*) Owen. 37: 7 Mod. 38, case 48; *R.* v. *Budd*, Parker. 192, 195: Manning's Exchequer Practice. 42. 2nd ed.

(*z*) Stat. 3 & 4 Will. IV. c. 104; *ante*, pp. 275, 408. Before this Act, copyholds were not assets even for payment of debts, in which the heir was expressly bound: 4 Rep. 22 a.

(*a*) Stat. 1 & 2 Vict. c. 110, s. 11; *ante*, p. 264.

(*b*) Sect. 13.

(*c*) *Ante*, pp. 264, 265.

(*d*) Stat. 2 & 3 Vict. c. 11, s. 5; *ante*, p. 265.

reduced the lien of judgments, and of which an account has been given in the chapter on Creditors' Rights, have all applied to copyholds as well as freeholds (*e*). Copyholds now vest in the trustee for the creditors on the bankruptcy of the tenant (*f*). But where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee is not compellable to be admitted to the property, but may deal with the same in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint: and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly (*g*). Estates tail and for life in copyholds are now liable to alienation for the judgment debts or on the bankruptcy of the tenant to the same extent as like estates in freeholds (*h*). Copyholds, however, are not affected by any liability imposed on real estate by the Land Transfer Act, 1897 (*i*), for the debts or funeral, testamentary or administration expenses of a deceased owner; as the expression "real estate" in Part I. of that Act is not to be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*k*).

Bankruptcy.

Trustee for creditors need not be admitted.

Estates tail.

The devolution of legal estates in copyholds on death accordingly remains unaffected by those provisions of the last mentioned Act, under which freehold estates

Devolution of copyholds on death.

(*e*) *Ante*, pp. 265—268.

(*f*) Stat. 46 & 47 Vict. c. 52, ss. 20, 168.

(*g*) Stat. 46 & 47 Vict. c. 52, s. 50, sub-s. 4. The former enactments relating to this subject were stats. 12 & 13 Vict. c. 106, s. 209; 24 & 25 Vict. c. 134, s. 114; and 32 & 33 Vict. c. 71, s. 22.

(*h*) *Ante*, pp. 282, 283.

(*i*) Stat. 60 & 61 Vict. c. 65, Part I.; *ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 213, 218—221, 241, 282, 286, 311, 341, 372, 423, 427, 433, 437.

(*k*) Sect. 1 (4).

Descent of an estate in fee simple in copyholds.

in fee simple now vest, on the tenant's death, in his executors or administrators (*l*). The descent of an estate in fee simple in copyholds is governed by the custom of descent which may happen to prevail in the manor; but subject to any such custom, the provisions contained in the Inheritance Act, 1833 (*m*), apply to copyhold as well as freehold hereditaments, whatever be the customary course of their descent (*n*). As, in the case of freeholds at common law, the lands of a person dying intestate descend at once to his heir (*o*), so the heir of a copyholder becomes, immediately on the decease of his ancestor, tenant of the lands, and may exercise any act of ownership before the ceremony of his admittance has taken place (*p*). But as between himself and the lord, he is not completely a tenant till he has been admitted.

Tenure.
Fealty.
Suit of Court.
Escheat.

The tenure of an estate in fee simple in copyholds involves, like the tenure of freeholds, an oath of fealty from the tenant (*q*), together with suit to the customary Court of the manor. Escheat to the lord on failure of heirs is also an incident of copyhold tenure. And before the abolition of forfeiture for treason and felony (*r*) the lord of a copyholder had the advantage over the lord of a freeholder in this respect, that, whilst freehold lands in fee simple were forfeited to the Crown by the treason of the tenant, the copyholds of a traitor escheated to the lord of the manor of which they were held (*s*).

Rent.

Rents (*t*) also of small amount are not

(*l*) *Ante*, pp. 29, 74, 84, 85, 108, 131, 187, 202, 213, 218, 311, 344, 373, 423, 427, 433, 437.

(*m*) Stat. 3 & 4 Will. IV. c. 106.

(*n*) See *Re Smart*, 18 Ch. D. 165.

(*o*) *Ante*, p. 84.

(*p*) 1 Scriv. Cop. 357; *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664; *King* v. *Turner*, 1 My. & K. 456; *Doe* d. *Perry* v. *Wilson*, 5 A. & E. 321.

(*q*) 2 Scriv. Cop. 732; Vinogradoff, Villainage, 164.

(*r*) See *ante*, p. 55.

(*s*) *Lord Cornwallis's case*, 2 Ventr. 38; 1 Watk. Cop. 340; 1 Scriv. Cop. 552.

(*t*) Rent incident to copyhold tenure may be redeemed or extinguished under the enactments cited, *ante*, p. 55, n. (*e*).

unfrequent incidents of the tenure of copyhold estates. And reliefs (*u*) may, by special custom, be payable by the heir (*x*). The other incidents of copyhold tenure depend on the customs of each particular manor; for this tenure, as we have seen (*y*), escaped the destruction in which the tenures of all freehold lands (except free and common socage, and frankalmoign) were involved by the Act of 12 Car. II. c. 24. When a copyholder in fee aliens his land to another in tail or for life, the latter does not hold of him, as he would in the case of freeholds (*z*), but of the lord (*a*). Relief.

A curious incident to be met with in the tenure of some copyhold estates is the right of the lord, on the death of a tenant, to seize the tenant's best beast, or other chattel, under the name of a heriot (*b*). Heriots were English institutions before the Norman Conquest. The heriot, properly so-called, was a tribute of war-horses, weapons and armour, varying in quantity according to the degree, which became due to the king on the death of an earl or a thegn (*c*). Its origin is traced to the horse and arms with which the German *princeps* supplied each of his *comites*, and which reverted to him on the death of the *comes* (*d*). When the law of feudal tenure by military service had grown up in England after the Norman Conquest, these heriots were generally superseded by reliefs (*e*), and so became obsolete. The heriots, which are now connected with copyhold tenure, have a different origin. Before the Norman Conquest, Heriots.

(*u*) *Ante*, pp. 47, 51, 55; Vinogradoff. Vill. in Eng. 162.
(*x*) 1 Scriv. Cop. 436.
(*y*) *Ante*, p. 54.
(*z*) *Ante*, pp. 107, 112.
(*a*) Litt. s. 74; *ante*, p. 448.
(*b*) 1 Scriv. Cop. 437 *sq.*
(*c*) Kemble, Saxons in England. Vol. I. p. 178; Vol. II. p. 98; 1 Stubbs, Const. Hist. 200, note, 2nd ed.; Maitland, Domesday Book and Beyond. 298. See Stubbs, Select Charters. 74. 91.
(*d*) Tacitus, Germania, c. 14; see Maine, Early Law and Custom, pp. 346—348; 1 Stubbs, Const. Hist. 24, 2nd ed.
(*e*) 1 Stubbs, Const. Hist. § 96, p. 261, 2nd ed.; Freeman, Norm. Conq. Vol. V. pp. 379, 867; P. & M. Hist. Eng. Law, i. 293—295.

it appears to have been the custom in many places that the freeholder of land, who took a man to work on his demesne as his tenant in villenage, should furnish him with oxen, a cow, sheep and implements of husbandry, as his farming outfit. These remained the property of the freeholder, and reverted to him on the tenant's death (*f*); but were usually transferred to the new tenant along with the holding. As time went on, it became an established custom that the tenant's heir should succeed to his deceased ancestor's holding, and that the landlord should not take into his own hands all the deceased tenant's cattle and stock, but should only take the best beast or some other chattel. The chattel, which the lord was accustomed to take for himself on the death of his tenant in villenage, seems to have acquired the name of heriot, by analogy to the heriot properly so-called (*g*). And to the taking of this so-called *heriot*, the lord's right in the tenant's chattels was at last restricted (*h*). In this way the heriot became an incident of tenure in villenage, and it remained an incident of copyhold tenure (*i*). The right of the lord is now confined to such a chattel as the custom of the

(*f*) See Seebohm, Eng. Vill. Comm. 132, 138, also p. 61; Maitland, Domesday Book and Beyond, 37, 38, 327—329.

(*g*) Kemble, Saxons in England, Vol. I. p. 178; Vol. II. p. 98; Vinogradoff, Vill. in Eng. 159—162; P. & M. Hist. Eng. Law, i. 297, 298.

* Heriot custom.

(*h*) See Laws of Cnut. c. 71; Stubbs, Select Charters, p. 74, 2nd ed.: Glanv. vii. 5; Bract. fo. 60, 86 a; Britt. lib. 3, c. v, § 5, fo. 178: Fleta, lib. 2, c. lvii.

(*i*) Sometimes a heriot is due on the death of a freeholding tenant of a manor, either as rent *service*, or by virtue of an immemorial *custom*. Heriot service is when a heriot has been reserved as an incident of the tenure of an estate in fee simple granted in free tenure before stat. 18 Edw. I. c. 1. Such a reservation would seem to point to the grant of an estate of freehold upon the enfranchisement of a holding in villenage. When a heriot is due from a freeholder by custom (called *heriot custom), the fact also seems to point to a heriot, yielded by a former tenant in villenage, which has remained the lord's customary due after the enfranchisement of the holding. See *ante*, pp. 44, 50, 442, and note (*c*): 1 Scriv. Cop. 437 *sq.*, 3rd ed.: Williams on Seisin, App. A. By the custom of the manor of South Tawton, otherwise Itton, in the county of Devon, heriots are still due from the freeholders of the manor; *Damerell* v. *Protheroe*.

Heriot service.

manor, grown into a law, will enable him to take (*k*). The kind of chattel which may be taken for a heriot varies in different manors. And in some cases the heriot consists merely of a money payment.

Joint tenancy and in common.

All kinds of estates in copyholds, as well as in freeholds, may be held in joint tenancy or in common; and an illustration of the unity of a joint tenancy occurs in the fact, that the admittance, on the court rolls of a manor, of one joint tenant, is the admittance of all his companions; and on the decease of any of them the survivors or survivor, as they take no new estate, require no new admittance (*l*). The jurisdiction of the Court of Chancery in enforcing partitions between joint tenants and tenants in common did not formerly extend to copyhold lands (*m*). But by the Copyhold Act of 1841 (*n*) this jurisdiction was extended to the partition of copyholds as well as freeholds.

Enfranchisement of copyholds.

If the fee simple of a copyhold tenement be conveyed by the lord to the tenant, the copyhold tenure, with all its incidents, is for ever extinguished (*o*). When a manor, of which lands were held by copy, was included in a settlement, it was usual to give to any tenant for life thereunder, a power, operating under the Statute of Uses (*p*), to convey the fee simple so as to enfranchise any such lands (*q*). And the Settled Land Act, 1882,

10 Q. B. 20; and in Sussex and some parts of Surrey heriots from freeholders are not unfrequent. See *Lord Zouche* v. *Dalbiac*, L. R. 10 Ex. 172; *Harrison* v. *Powell*, 10 Times L. R. 271.

(*k*) 2 Watk. Cop. 129; see *Western* v. *Bailey*, 1897, 1 Q. B. 86.

(*l*) 1 Watk. Cop. 272, 277.

(*m*) *Jope* v. *Morshead*, 6 Beav. 213.

(*n*) Stat. 4 & 5 Vict. c. 35, s. 85, now replaced by 57 & 58 Vict. c. 46, s. 87.

(*o*) 1 Watk. Cop. 362; 1 Scriv. Cop. 653. Deeds of enfranchisement of copyholds in Middlesex or Yorkshire must be duly registered: *R.* v. *Registrar for Middlesex*, 21 Q. B. D. 555; *ante*, p. 206.

(*p*) *Ante*, pp. 381—385.

(*q*) The Copyhold Act, 1841, now replaced in this respect by the Copyhold Act, 1894, Pt. II., afforded facilities for enfranchisement where the lord or tenant was not entitled to the whole estate in the manor or the land; stat. 4 & 5 Vict. c. 35,

now empowers the tenant for life of a manor to sell and convey the freehold and inheritance of any copyhold or customary land, parcel of the manor, either with or without the mines and minerals thereunder, so as to effect an enfranchisement (*r*). In such cases the terms of the enfranchisement are of course a matter of agreement between the parties. But by the Copyhold Act, 1852 (*s*), now replaced by the Copyhold Act, 1894 (*t*), the enfranchisement of copyholds (*u*) has been made compulsory at the instance either of the lord or the tenant. Under the present Act, the compensation payable to the lord is ascertained by valuation, if the parties cannot agree thereon (*v*). And if the enfranchisement be at the instance of the lord, or the compensation amount to more than one year's improved value of the land, the compensation shall, unless the parties otherwise agree or the tenant desires to pay a gross sum, be an annual rent-charge of four per cent. of the amount of the compensation to issue out of the enfranchised land: otherwise the compensation shall be paid in a gross sum before the completion of the enfranchisement (*y*). Provision is made for charging the enfranchised lands with the cost of enfranchisement (*z*). Enfranchisement under this Act is effected by an award of the Board of Agriculture (*a*), and makes the land to be of freehold tenure, irrespective of the validity of the lord's title (*b*). Such

Compulsory enfranchisement.

ss. 56 *sq.*; amended by 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55, ss. 4, 5; and replaced by 57 & 58 Vict. c. 46, ss. 14—20.

(*r*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20; see *ante*, pp. 121—124.

(*s*) Stat. 15 & 16 Vict. c. 51, amended by 21 & 22 Vict. c. 94; 50 & 51 Vict. c. 73.

(*t*) Stat. 57 & 58 Vict. c. 46.

(*u*) The provisions of the Acts as to compulsory enfranchisement do not extend to copyholds for lives or years, where the tenant has no right of renewal (*ante*, p. 448), or to manors in which the Crown has any estate or interest; stat. 57 & 58 Vict. c. 46, s. 96, replacing 15 & 16 Vict. c. 51, s. 48.

(*v*) Stat. 57 & 58 Vict. c. 46, ss. 5—7.

(*y*) Sect. 8.

(*z*) Sect. 36, replacing 15 & 16 Vict. c. 51, s. 32; 21 & 22 Vict. c. 94, ss. 21 *sq.*; 50 & 51 Vict. c. 73, s. 23.

(*a*) Stat. 57 & 58 Vict. c. 46, s. 10, replacing 21 & 22 Vict. c. 94, s. 10; 52 & 53 Vict. c. 30, s. 2.

(*b*) See stat. 57 & 58 Vict.

enfranchisement, however, does not affect the rights of the parties in the mines or minerals under the land, without their consent (*c*); it does not deprive the tenant of any commonable right to which he was entitled in respect of the enfranchised land (*d*); and the lord is to be entitled, in case of an escheat, to the same right as he would have had if the land had not been enfranchised (*e*). The Act also provides for the extinguishment, at the instance of either lord or tenant, of any heriot, quit rent, free rent, or other manorial incident whatsoever affecting any land, freehold as well as copyhold (*f*).

c. 46. ss. 21, 26 (3, 4), 38, 61; and *Kerr* v. *Pearson*, 25 Beav. 394, decided on the former Act.

(*c*) Sect. 23, replacing 15 & 16 Vict. c. 51, s. 48; 21 & 22 Vict. c. 94, s. 14.

(*d*) Stat. 57 & 58 Vict. c. 46, s. 22, replacing 15 & 16 Vict. c. 51, s. 45.

(*e*) Stat. 57 & 58 Vict. c. 46, s. 21 (1 b), replacing 50 & 51 Vict. c. 73, ss. 4, 5. Enfranchisement by ordinary conveyance of the fee simple from the lord to the tenant causes the tenant to hold the land of the lord of whom the enfranchising lord held it before: *ante*, p. 39; Elton on Copyholds, 289.

(*f*) Stats. 57 & 58 Vict. c. 46, ss. 2, 94, replacing 50 & 51 Vict. c. 73, s. 7; 21 & 22 Vict. c. 94, s. 7; 15 & 16 Vict. c. 51, s. 27. The Copyhold Act, 1841, contained provisions, which were repealed by and not re-enacted in the Copyhold Act, 1894, for the commutation of the lord's manorial rights over his copyholds.

CHAPTER II.

OF THE ALIENATION OF COPYHOLDS.

The mode in which the alienation of copyholds is at present effected, so far at least as relates to transactions *inter vivos*, still retains much of the simplicity, as well as the inconvenience, of the original method in which the alienation of these lands was first allowed to take place. The copyholder surrenders the land into the hands of his lord, who thereupon admits the alienee.

Customary Court.

For the purpose of effecting these admissions, and of informing the lord of the different events happening within his manor, as well as for settling disputes, it was formerly necessary that his Customary Court, to which all the copyholders were suitors, should from time to time be held. The copyholders present at this Court were called the *homage*;

Homage.

a word equally used to denote the body of freeholders present at a Court Baron (*a*). In order to form a Court, it was formerly necessary that two copyholders at least should be present (*b*). But, in modern times, the holding of Courts having degenerated into little more than an inconvenient formality, it has been provided by the Copyhold Acts, 1841 and 1894, that Customary Courts may be holden without the presence of any copyholder; but no proclamation made at any such Courts shall affect the right or interest of any person not present, unless notice thereof shall be duly served on him within one month (*c*). But where, by the custom

Courts may now be holden without the presence of any copyholder.

(*a*) *Ante*, pp. 444, 446; 1 Scriv. Cop. 7.

(*b*) 1 Scriv. Cop. 289.

(*c*) Stat. 4 & 5 Vict. c. 35, s. 86, now replaced by 57 & 58 Vict. c. 46, s. 82.

of any manor, the lord is authorized, with the consent of the homage, to grant any common or waste lands of the manor, the Court must be duly summoned and holden as before (*d*). No Court can lawfully be held out of the manor; but by immemorial custom, Courts for several manors may be held together within one of them (*e*). In order that the transactions at the Customary Court may be preserved, a book is provided, in which a correct account of all the proceedings is entered by a person duly authorized. This book, or a series of them, forms the court rolls of the manor. The person who makes the entries is the steward; and the court rolls are kept by him, but subject to the right of the tenants to inspect them (*f*). This officer also usually presides at the Court of the manor.

Court rolls.

Steward.

Before adverting to alienation by surrender and admittance, it will be proper to mention, that, whenever any lands, which have been demisable time out of mind by copy of court roll, fall into the hands of the lord, he is at liberty to grant them to be held by copy at his will, according to the custom of the manor, under the usual services (*g*). These grants may be made by the lord for the time being, whatever be the extent of his interest (*h*), so only that it be lawful: for instance, by a tenant for a term of life or years. But if the lord instead of granting the lands by copy, should once make any conveyance of them at the common law, though it were only a lease for years, his power to grant by copy would for ever be destroyed (*i*). The steward, or his deputy, if duly authorized so to do, may also make

Grants.

(*d*) Stats. 4 & 5 Vict. c. 35, s. 91: 57 & 58 Vict. c. 46, ss. 82 (2), 83.

(*e*) 1 Scriv. Cop. 6.

(*f*) Ibid. 587, 588.

(*g*) 1 Watk. Cop. 33; 1 Scriv. Cop. 111.

(*h*) *Doe* d. *Rayer* v. *Strickland*, 2 Q. B. 792.

(*i*) 1 Watk. Cop. 37. See too stats. 50 & 51 Vict. c. 73, s. 6; 57 & 58 Vict. c. 46, s. 81.

grants, as well as the lord, whose servant he is (*k*). It was formerly doubtful whether the steward or his deputy could make grants of copyholds when out of the manor (*l*). But by the Copyhold Acts, 1841 and 1894 (*m*), such grants may be made out of the manor by the lord, the steward, or the deputy steward.

Grants may now be made out of the manor.

Alienation by surrender.

When a copyholder is desirous of disposing of his lands, the usual method of alienation is by surrender of the lands into the hands of the lord (usually through the medium of his steward), to the use of the alienee and his heirs, or for any other customary estate which it may be wished to bestow. This surrender generally takes place by the symbolical delivery of a rod, by the tenant to the steward. It may be made either in or out of Court. If made in Court, it is of course entered on the court rolls, together with the other proceedings; and a copy of so much of the roll as relates to such surrender is made by the steward, signed by him, and stamped like a purchase deed; it is then given to the purchaser as a muniment of his title (*n*). If the surrender should be made out of Court, a memorandum of the transaction, signed by the parties and the steward is made, in writing, and duly stamped as before (*o*). In order to give effect to a surrender made out of Court, it was formerly necessary that due mention, or *presentment*, of the transaction, should be made by the suitors or homage assembled at the next, or, by special custom, at some other subsequent Court (*p*). And in this manner

In Court.

Out of Court.

Presentment.

(*k*) 1 Watk. Cop. 29.

(*l*) Ibid. 30.

(*m*) Stat. 4 & 5 Vict. c. 35. s. 87, now replaced by 57 & 58 Vict. c. 46. s. 83.

(*n*) A form of such a copy of court roll will be found in Appendix (D).

(*o*) By the Stamp Act, 1891, the stamp duty on a memorandum of a surrender if made out of Court, or on the copy of court roll if made in Court, is the same as on the sale or mortgage of a freehold estate; but if not made on a sale or mortgage, the duty is 10*s*. Stat. 54 & 55 Vict. c. 39. 1st schedule, tit. Copyhold and Customary Estates, replacing stat. 33 & 34 Vict. c. 97, to the same effect.

(*p*) 1 Watk. Cop. 79; 1 Scriv. Cop. 277.

an entry of the surrender appeared on the court rolls, the steward entering the presentment as part of the business of the Court. But by the Copyhold Act, 1894 (replacing the Act of 1841), every surrender, which the lord is compellable to accept or accepts, shall be entered on the court rolls; and an entry so made shall be as valid as an entry made in pursuance of a presentment by the homage (*q*). So that in this case, the ceremony of presentment is now dispensed with. When the surrender has been made, the surrenderor still continues tenant to the lord, until the admittance of the surrenderee. The surrenderee acquires by the surrender merely an inchoate right, to be perfected by admittance (*r*). This right was formerly inalienable at law, even by will, until rendered devisable by the Wills Act, 1837 (*s*); but, like a possibility in the case of freeholds, it might always be released, by deed, to the tenant of the lands (*t*).

now unnecessary.

Nature of surrenderee's right until admittance.

A surrender of copyholds might always be made by a man to the use of his wife, for such a surrender is not a direct conveyance, but operates only through the instrumentality of the lord (*u*). And a valid surrender might at any time be made of the lands of a married woman, by her husband and herself; she being on such surrender separately examined, as to her free consent, by the steward or his deputy (*x*). Since the Vendor and Purchaser Act, 1874 (*y*), where any copyhold hereditament is vested in a married woman, as a bare trustee (*z*), she may surrender the

Surrender to the use of a wife.

Surrender of lands of the wife.

Married woman bare trustee.

(*q*) Stat. 57 & 58 Vict. c. 46, s. 85, replacing 4 & 5 Vict. c. 35, s. 89.

(*r*) *Doe* d. *Tofield* v. *Tofield*, 11 East, 246, 10 R. R. 467; *Rex* v. *Dame Jane St. John Mildmay*, 5 B. & Ad. 254; *Doe* d. *Winder* v. *Lawes*, 7 Ad. & E. 195.

(*s*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*t*) *Kite and Quainton's case*, 4 Rep. 25 a; Co. Litt. 60 a.

(*u*) Co. Cop. s. 35; Tracts, p. 79.

(*x*) 1 Watk. Cop. 63.

(*y*) Stat. 37 & 38 Vict. c. 78, s. 6, now replaced by 56 & 57 Vict. c. 53, s. 16.

(*z*) See *antr.* p. 313, n. (*s*).

Copyholds, which are wife's separate property.

same as if she were a feme sole. And under the Married Women's Property Act, 1882 (*a*), a married woman may dispose of copyholds, which belong to her as her separate property by virtue of that Act in the same manner as if she were a feme sole.

Admittance.

When the surrender has been made, the surrenderee has, at any time, a right to procure *admittance* to the lands surrendered to his use; and, on such admittance, he becomes at once tenant to the lord, and is bound to pay him the customary fine. This admittance is usually taken immediately (*b*); but, if obtained at any future time, it will relate back to the surrender; so that, if the surrenderor should, subsequently to the surrender, have surrendered to any other person, the admittance of the former surrenderee, even though it should be subsequent to the admittance of the latter, will completely displace his estate (*c*). Formerly a steward was unable to admit tenants out of a manor (*d*); but by the Copyhold Act, 1894 (replacing the Act of 1841), a valid admittance may be made, either by the lord, his steward, or deputy, out of the manor, without holding a Court, and without any presentment of the surrender, in pursuance of which admission may have been granted (*e*). Admittance may also be implied from the lord's accepting quit rents from a person paying them as heir of or surrenderee from a former copyhold tenant (*f*).

Admittance may now be had out of the manor.

Alienation by will.

The alienation of copyholds by will was formerly effected in a similar manner to alienation *inter vivos*. It was necessary that the tenant who wished to devise his estate should first make a surrender of it to the use

(*a*) Stat. 45 & 46 Vict. c. 75. ss. 1 (sub-s. 1), 2, 5: see *ante*, pp. 312—314.

(*b*) See Appendix (*D*).

(*c*) 1 Watk. Cop. 103.

(*d*) *Doe* d. *Leach* v. *Whittaker*, 5 B. & Ad. 409, 435; *Doe* d. *Gutteridge* v. *Sowerby*, 7 C. B., N. S., 599.

(*e*) Stat. 57 & 58 Vict. c. 46, s. 84, replacing 4 & 5 Vict. c. 35, ss. 88, 90.

(*f*) *Ecclesiastical Commrs.* v. *Parr*, 1894, 2 Q. B. 420.

of his will. His will then formed part of the surrender, and no particular form of execution or attestation was necessary. The devisee, on the decease of his testator, was, until admittance, in the same position as a surrenderee (*g*). By a statute of Geo. III. (*h*), a devise of copyholds, without any surrender to the use of the will, was rendered as valid as if a surrender had been made (*i*). The Wills Act of 1837 requires that wills of copyhold lands shall be executed and attested in the same manner as wills of freeholds (*k*). But a surrender to the use of the will is still unnecessary; and a surrenderee, or devisee, who has not been admitted, is now empowered to devise his interest (*l*). Formerly, the devisee under a will was accustomed, at the next Customary Court held after the decease of his testator, to bring the will into Court: and a presentment was then made of the decease of the testator, and of so much of his will as related to the devise. After this presentment the devisee was admitted, according to the tenor of the will. But since the Copyhold Act of 1841, the mere delivery to the lord, or his steward, or deputy steward, of a copy of the will, has been sufficient to authorize its entry on the court rolls without the necessity of any presentment; and the devisee may be admitted at once (*m*).

Presentment of will.

now unnecessary.

Sometimes, on the decease of a tenant, no person comes in to be admitted as his heir or devisee. In this case the lord, after making due proclamation at three consecutive Courts of the manor for any person having right to the premises to claim the same and be admitted thereto, is entitled to seize the lands into his own hands

If no person claim admittance, the lord may seize *quousque*.

(*g*) *Wainewright* v. *Elwell*, 1 Mad. 627; *Phillips* v. *Phillips*, 1 My. & K. 649, 664.

(*h*) 55 Geo. III. c. 192, 12th July, 1815.

(*i*) *Doe* d. *Nethercote* v. *Bartle*, 5 B. & A. 492.

(*k*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 2, 3, 4, 5, 9; see *ante*, p. 238; *Garland* v. *Mead*, L. R. 6 Q. B. 441.

(*l*) Sect. 3.

(*m*) Stat. 4 & 5 Vict. c. 35, ss. 88, 89, 90, now replaced by 57 & 58 Vict. c. 46, ss. 84, 85.

quousque, as it is called, that is, *until* some person claims admittance (*n*); and by the special custom of some manors, he is entitled to seize the lands absolutely.

Provision in favour of infants, married women, lunatics.

But as this right of the lord might be very prejudicial to infants, married women, and lunatics entitled to admittance to any copyhold lands, in consequence of their inability to appear, special provision has been made by Act of Parliament for the vicarious admission of such persons, securing to the lord his proper fine, and prohibiting any absolute forfeiture of the lands for the neglect or refusal of any infant, married woman, or lunatic so found by inquisition to come in and be admitted, or to pay the fine imposed on admittance (*o*).

Statute of Uses does not apply to copyholds.

Although mention has been made of surrenders *to the use* of the surrenderee, it must not therefore, be supposed that the Statute of Uses (*p*) has any application to copyhold lands. This statute relates exclusively to freeholds. The seisin or feudal possession of all copyhold land ever remains, as we have seen (*q*), vested in the lord of the manor. Notwithstanding that custom has given to the copyholder the enjoyment of the lands, they still remain, in contemplation of law, the lord's freehold. The copyholder cannot, therefore, simply by means of a surrender to his use from a former copyholder, be deemed, in the words of the Statute of Uses, in lawful seisin for such estate as he has in the use; for the estate of the surrenderor is customary only, and the estate of the surrenderee cannot, consequently, be greater. Custom, however, has now rendered the title of the copyholder quite independent of that of his lord. When a surrender of copyholds is made into the hands of the

(*n*) 1 Watk. Cop. 234: 1 Scriv. Cop. 355; *Doe* d. *Borer* v. *Trueman*, 1 B. & Ad. 736. See *Ecclesiastical Commrs.* v. *Parr*, 1894, 2 Q. B. 420.

(*o*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 3—9; 53 Vict. c. 5, ss. 116, 125, 126. See *Doe* d. *Twining* v. *Muscott*, 12 M. & W. 832, 842; *Dimes* v. *Grand Junction Canal Company*, 9 Q. B. 469, 510.

(*p*) Stat. 27 Hen. VIII. c. 10; *ante*, p. 171.

(*q*) *Ante*, p. 452.

lord *to the use* of any person, the lord is now merely an instrument for carrying the intended alienation into effect; and the title of the lord, so that he be lord *de facto*, is quite immaterial to the validity either of the surrender or of the subsequent admittance of the surrenderee (*r*). But if a surrender should be made for one person to the use of another *upon trust* for a third, the High Court of Justice would exercise the same jurisdiction over the surrenderee, in compelling him to perform the trust, as it would in the case of freeholds vested in a trustee. And when copyhold lands form the subject of settlement, the usual plan is to surrender them to the use of trustees, as joint tenants of a customary estate in fee simple, upon such trusts as will effect, in equity, the settlement intended. The trustees thus become the legal copyhold tenants of the lord, and account for the rents and profits to the persons beneficially entitled. The equitable estates which are thus created are of a similar nature to the equitable estates in freeholds, of which we have already spoken (*s*); and a trust for the separate use of a married woman might be created as well out of copyhold as out of freehold lands (*t*). An equitable estate tail in copyholds may be barred by deed, in the same manner in every respect as if the lands had been of freehold tenure (*u*). But the deed, instead of being inrolled in the Court of Chancery or the Supreme Court (*v*), must be entered on the court rolls of the manor (*y*). And if there be a protector, and he consent to the disposition by a distinct deed, such deed must be executed by him either on, or any time before, the day on which the deed barring the entail is executed; and the deed of consent must also be entered on the

Trusts.

Settlements.

Separate use.

Equitable estate tail may be barred by deed.

(*r*) 1 Watk. Cop. 74
(*s*) *Ante*, p. 178 *sq.*
(*t*) See *ante*, p. 306.
(*u*) See *ante*, p. 185.
(*v*) Stat. 3 & 4 Will. IV. c. 74. s. 54. See *ante*, p. 98.
(*y*) Sect. 53. It has been decided, contrary to the prevalent impression, that the entry must be made within six calendar months. *Honeywood* v. *Forster*. 30 Beav. 1: *Gibbons* v. *Snape*. 32 Beav. 130; *Green* v. *Paterson*. 32 Ch. D. 95.

Devolution of copyholds on death of trustee.

court rolls (*z*). Upon the death of a sole trustee of copyholds, being the tenant on the court rolls, his estate, if of inheritance, does not devolve upon his personal representatives, according to the law now governing the devolution of a similar interest in freeholds, but will pass to his heir or devisee (*a*). The wording of the Land Transfer Act, 1897 (*b*), has left open the question, whether the estate of a *cestui que trust* of copyholds entitled in fee devolves on his death to his personal representatives in the same manner as a like equitable estate in freeholds (*c*), or passes to his heir or devisee according to the previous law.

Of cestui que trust.

Equitable estate cannot be surrendered.

As the owner of an equitable estate has, from the nature of his estate, no legal rights to the lands, he is not himself a copyholder. He is not a tenant to the lord: this position is filled by his trustee. The trustee, therefore, is admitted and may surrender; but the cestui que trust cannot adopt these means of disposing of his equitable interest (*d*). To this general rule, however, there have been admitted, for convenience' sake, two exceptions. The first is that of a tenant in tail whose estate is merely equitable: by the Act for the abolition of fines and recoveries (*e*), the tenant of a merely equitable estate tail is empowered to bar the entail, either by deed in the manner above described, or by surrender in the same manner as if his estate were legal (*f*). The second exception relates to married women, it being provided by the same Act (*g*) that

Exceptions.

Tenant of equitable estate tail may bar entail by surrender.

(*z*) Stat. 3 & 4 Will. IV. c. 74, s. 53.

(*a*) Stats. 57 & 58 Vict. c. 46, s. 88; 50 & 51 Vict. c. 73, s. 45, repealing 44 & 45 Vict. c. 41, s. 30, as to copyholds; see *ante*, p. 188; *Re Mills' Trusts*, 37 Ch. D. 312, 40 Ch. D. 14.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 1 (4); *ante*, p. 463.

(*c*) *Ante*, p. 187.

(*d*) 1 Scriv. Cop. 262. No fine can be exacted by the lord in respect of any devolution of the equitable estate: *Hall* v. *Bromley*, 35 Ch. D. 642.

(*e*) Stat. 3 & 4 Will. IV. c. 74, s. 50.

(*f*) See *ante*, p. 160.

(*g*) Stat. 3 & 4 Will. IV. c. 74, s. 90.

whenever a husband and wife shall surrender any copyhold lands in which she alone, or she and her husband in her right, may have any equitable estate or interest, the wife shall be separately examined in the same manner as she would have been, had her estate or interest been at law instead of in equity merely (*h*); and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders previously made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are thereby declared to be good and valid. But these methods of conveyance, though tolerated by the law, are not in accordance with principle; for an equitable estate is, strictly speaking, an estate in the contemplation of equity only, and has no existence anywhere else. As, therefore, an equitable estate tail in copyholds may properly be barred by a deed entered on the court rolls of the manor, so an equitable estate or interest in copyholds belonging to a married woman was more properly conveyed by a deed, executed with her husband's concurrence, and *acknowledged* by her in the same manner as if the lands were freehold (*i*). And the Fines and Recoveries Act, by which this mode of conveyance is authorized, does not require that such a deed should be entered on the court rolls. If a married woman's equitable estate in copyholds belong to her for her separate use, or as her separate property under the Married Women's Property Act, 1882, she may dispose thereof in the same manner as if she were a feme sole (*k*).

Husband and wife may surrender wife's equitable estate.

Copyhold estates admit of remainders analogous to those which may be created in estates of freehold (*l*).

Remainders.

(*h*) See *ante*, p. 473.
(*i*) Stat. 3 & 4 Will. IV. c. 74, s. 77; see *Carter* v. *Carter*, 1896, 1 Ch. 62; *ante*, p. 303.
(*k*) See *ante*, pp. 306—314.
(*l*) See *ante*, pp. 332, 346.

And when a surrender or devise is made to the use of any person for life, with remainders over, the admission of the tenant for life is the admission of all persons having estates in remainder, unless there be in the manor a special custom to the contrary (*m*). A vested estate in remainder is capable of alienation by the usual mode of surrender and admittance. Contingent remainders of copyholds have always had this advantage, that they have never been liable to destruction by the sudden determination of the particular estate on which they depend. The freehold, vested in the lord, is said to be the means of preserving such remainders until the time when the particular estate would regularly have expired (*n*). In this respect they resemble contingent remainders of equitable or trust estates of freeholds, as to which we have seen that the legal seisin, vested in the trustees, preserves the remainders from destruction (*o*). But if the contingent remainder be not ready to come into possession the moment the particular estate would naturally and regularly have expired, such contingent remainder will fail altogether (*p*): unless it should have been created after the Act of 1877 amending the law as to contingent remainders (*q*), and would have been valid, if created as an executory limitation; in which case it will be preserved by the Act, which extends to hereditaments of any tenure. In other respects the creation of contingent remainders of legal and equitable estates in copyholds appears to be governed by the same rules as are applicable to similar interests in freeholds (*r*).

Contingent remainders.

(*m*) 1 Watk. Cop. 276: *Doe* d. *Winder* v. *Lawes*, 7 A. & E. 195; *Smith* v. *Glasscock*, 4 C. B., N. S., 357; *Randfield* v. *Randfield*, 1 Dr. & S. 310. See, however, as to the reversioner, *Reg.* v. *Lady of the Manor of Dallingham*, 8 A. & E. 858.

(*n*) Fearne, C. R. 319: 1 Watk. Cop. 196: 1 Scriv. Cop. 477; *Pickersgill* v. *Grey*, 30 Beav. 352.

(*o*) *Ante*, p. 365.

(*p*) Gilb. Ten. 266; Fearne, C. R. 320.

(*q*) Stat. 40 & 41 Vict. c. 33; see *ante*, pp. 354, 399.

(*r*) *Ante*, pp. 399—405.

Executory devises of copyholds, similar in all respects to executory devises of freeholds, have long been permitted (*s*). And directions to executors to sell the copyhold lands of their testator (which directions, we have seen (*t*), give rise to executory interests) are still in common use; for, when such a direction is given, the executors, taking only a power and no estate, have no occasion to be admitted; and if they can sell before the lord has had time to hold his three Customary Courts for making proclamation in order to seize the land *quousque* (*u*), the purchaser from them will alone require admittance by virtue of his executory estate which arose on the sale. By this means the expense of only one admittance is incurred; whereas, had the lands been devised to the executors in trust to sell, they must first have been admitted under the will, and then have surrendered to the purchaser, who again must have been admitted under their surrender. And in a case, where a testator devised copyholds to such uses as his trustees should appoint, and subject thereto to the use of his trustees, their heirs and assigns for ever, with a direction that they should sell his copyholds, it was decided that the trustees could make a good title without being admitted, even although the lord had in the meantime seized the land *quousque* for want of a tenant (*x*). But it has been decided that the lord of a manor is not bound to accept a surrender of copyholds *inter vivos*, to such uses as the surrenderee shall appoint, and, in default of appointment, to the use of the surrenderee, his heirs and assigns (*y*). This decision is in accordance with the old rule, which construed surrenders of copyholds in the same manner as a conveyance

Executory devises.

Lord not bound to accept a surrender *inter vivos* to shifting uses.

(*s*) 1 Watk. Cop. 210.

(*t*) *Ante*, p. 388. The stat. 21 Hen. VIII. c. 4 applies to copyholds; *Peppercorn* v. *Wayman*, 5 De G. & S. 230; *ante*, p. 389.

(*u*) See *ante*, p. 475.

(*x*) *Glass* v. *Richardson*, 9 Hare, 698, 2 De G. M. & G. 658; and see *R.* v. *Corbett*, 1 E. & B. 836; *R.* v. *Wilson*, 3 B. & S. 201.

(*y*) *Flack* v. *Downing College*, 17 Jur. 697, 13 C. B. 945.

of freeholds *inter vivos* at common law (*z*). If, however, the lord should accept such a surrender, he will be bound by it, and must admit the appointee under the power of appointment, in case such power should be exercised (*a*).

Husband and wife.

With regard to the interest possessed by husband and wife in each other's copyhold lands, the husband was entitled to the whole income of his wife's land during her coverture, unless the land were settled on trust for her separate use (*b*). But the Married Women's Property Act, 1870 (*c*), provided that when any copyhold or customary property should descend upon any woman married after the passing of that Act, as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use. And under the Married Women's Property Act, 1882, a married woman is entitled to have and to hold any copyhold land, which belongs to her as her separate property under that Act, and the rents and profits thereof, in the same manner as if she were a feme sole (*d*). A special custom appears to be necessary to entitle a husband to be tenant by curtesy of his wife's copyholds (*e*). A special custom also is required to entitle the wife to any interest in the lands of her husband after his decease. Where such custom exists, the wife's interest is termed her *freebench*; and it generally consists of a life interest in one divided third part of the lands, or sometimes of a life interest in the

Married Women's Property Act, 1870.

Wife's separate property.

Curtesy.

Freebench.

(*z*) 1 Watk. Cop. 108, 110; 1 Scriv. Cop. 178.

(*a*) *R.* v. *Oundle*, 1 A. & E. 283; *Boddington* v. *Abernethy*, 5 B. & C. 776, 9 Dow. & Ry. 626; 1 Scriv. Cop. 226, 229; *Eddleston* v. *Collins*, 3 De G. M. & G. 1.

(*b*) 1 Watk. Cop. 273, 335, 4th ed. See *ante*, pp. 300, 306.

(*c*) Stat. 33 & 34 Vict. c. 93. s. 8; passed 9th Aug. 1870. See *ante*, pp. 309, 310 & n. (*p*).

(*d*) See *ante*, pp. 310—313.

(*e*) 2 Watk. Cop. 71. See as to freeholds, *ante*, p. 300.

entirety (*f*); and, like dower under the old law, freebench is paramount to the husband's debts (*g*). Freebench, however, usually differs from the ancient right of dower in this important particular, that whereas the widow was entitled to dower of all freehold lands of which her husband was solely seised *at any time* during the coverture (*h*), the right to freebench does not usually attach until the actual decease of the husband (*i*), and it may be defeated by a devise of the lands by the will of the husband (*k*). Freebench, therefore, is in general no impediment to the free alienation by the husband of his copyhold lands, without his wife's concurrence. To this rule the important manor of Cheltenham forms an exception; for, by the custom of this manor, as settled by Act of Parliament, the freebench of widows attaches, like the ancient right of dower out of freeholds, on all the copyhold lands of inheritance of which their husbands were tenants at any time during the coverture (*l*). The Dower Act (*m*) does not extend to freebench (*n*). Enfranchisement under the Copyhold Acts, 1852 or 1894 (*o*), does not affect the dower, freebench or curtesy of any person married before the enfranchisement takes effect (*p*).

Manor of Cheltenham is an exception.

Dower Act.

(*f*) 1 Scriv. Cop. 89.
(*g*) *Spyer* v. *Hyatt*, 20 Beav. 621.
(*h*) *Ante*, p. 314.
(*i*) 2 Watk. Cop. 73.
(*k*) *Lacey* v. *Hill*, L. R. 19 Eq. 346.
(*l*) *Doe* d. *Riddell* v. *Gwinnell*, 1 Q. B. 682.
(*m*) Stat. 3 & 4 Will. IV. c. 105; *ante*, p. 318.
(*n*) *Smith* v. *Adams*, 18 Beav. 499, 5 De G. M. & G. 712.
(*o*) *Ante*, pp. 468, 469.
(*p*) Stat. 57 & 58 Vict. c. 46. s. 21, replacing 15 & 16 Vict. c. 51, s. 31.

PART IV.

OF PERSONAL INTERESTS IN REAL ESTATE.

The subjects which have hitherto occupied our attention derive a great interest from the antiquity of their origin. We have seen that the difference between freehold and copyhold tenure has arisen from the distinction which prevailed, in ancient times, between free tenure and tenure in villenage (*a*): and that estates of freehold in lands and tenements owe their origin to the ancient feudal system (*b*). The law of real property, in which term both freehold and copyhold interests are included, is full of rules and principles to be explained only by a reference to antiquity; and many of those rules and principles were, it must be confessed, much more reasonable and useful when they were first instituted than they are at present. The subjects, however, on which we are now about to be engaged possess little of the interest which arises from antiquity; although their present value and importance are unquestionably great. The principal interests of a personal nature derived from landed property, are a term of years and a mortgage. The origin and reason of the personal nature of a term of years in land have been already attempted to be explained (*c*); and at the present day, leasehold interest in land, in which, amongst other things, all building leases are included, form a subject sufficiently important to require a separate consideration.

Term of years.

(*a*) *Ante*, pp. 16. 41—44. 440.
(*b*) *Ante*, pp. 12—15. 41—44.
(*c*) *Ante*, pp. 16—20. 27. 28.

Mortgage.

The personal nature of a mortgage was not clearly established till long after a term of years was considered as a chattel (*d*). But it is now settled that every mortgage, whether with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee (*e*). And when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous. It may be pointed out that mortgages, as well as leaseholds (*f*), are included in personal estate as passing to the executor or administrator, without reference to the question whether they are things specifically recoverable. As will be seen further on, the estate of a mortgagee may have the quality and incidents of real estate *at law*, but will nevertheless form part of his personal estate *in equity* (*g*).

(*d*) *Thornborough* v. *Baker*, 1 Cha. Ca. 283; 3 Swanst. 628, anno 1675; *Tabor* v. *Tabor*, 3 Swanst. 636.

(*e*) Co. Litt. 208 a, n. (1).

(*f*) *Ante*, pp. 25—28.

(*g*) *Ante*, pp. 158—181.

CHAPTER I.

OF A TERM OF YEARS.

At the present day, one of the most important kinds of chattel or personal interests in landed property is a term of years, by which is understood, not the time merely for which a lease is granted, but also the interest acquired by the lessee. Terms of years may practically be considered as of two kinds; first, those which are created by ordinary leases, which are subject to a yearly rent, which seldom exceed ninety-nine years, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation: and secondly, those which are created by settlements, wills, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently for one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land. But although terms of years of different lengths are thus created for different purposes, it must not, therefore, be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law.

Two kinds of terms of years.

The consideration of terms of the former kind, or those created by ordinary leases, may conveniently be preceded by a short notice of a tenancy at will, and a tenancy by sufferance. A tenancy at will may be created by parol (*a*), or by deed; it arises when a person

A tenancy at will.

(*a*) Stat. 29 Car. II. c. 3. s. 1.

lets land to another, to hold at the will of the lessor or person letting (*b*). The lessee, or person taking the lands, is called a tenant at will: and, as he may be turned out when his landlord pleases, so he may leave when he likes. A tenant at will is not answerable for mere permissive waste (*c*). He is allowed, if turned out by his landlord, to reap what he has sown, or, as it is legally expressed, to take the emblements (*d*). But as this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and, in construction of law, a lease at an annual rent, made generally without expressly stating it to be at will (*e*), and without limiting any certain period, is not a lease at will, but a lease from year to year (*f*), of which we shall presently speak. As we have seen (*g*), the Courts of law considered one in possession of land as *cestui que trust* to be merely the tenant at will of his trustees (*h*); although he might have been absolutely entitled in equity. A tenancy by sufferance is when a person, who has originally come into possession by a lawful title, holds such possession after his title has determined.

Emblements.

Cestui que trust tenant at will.

Tenancy by sufferance.

A lease from year to year is a method of letting very commonly adopted: in most cases it is much more advantageous to both landlord and tenant than a lease at will. The advantage consists in this, that both landlord and tenant are entitled to notice before the tenancy can be determined by the other of them (*i*). By the common law, this notice must be given at least half

Lease from year to year.

(*b*) Litt. s. 68; 2 Black. Comm. 145.

(*c*) *Harnett* v. *Maitland*, 15 M. & W. 257.

(*d*) Litt. s. 68; see *Graves* v. *Weld*, 5 B. & Ad. 105.

(*e*) *Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122; *Doe* d. *Dixie* v. *Davies*, 7 Ex. 89.

(*f*) *Right* d. *Flower* v. *Darby*, 1 T. R. 159, 163, 1 R. R. 169; *Dougal* v. *McCarthy*, 1893, 1 Q. B. 736.

(*g*) *Ante*, p. 184.

(*h*) *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 481. See *Melling* v. *Leak*, 16 C. B. 652.

(*i*) As to the effect of an assignment of his interest by a tenant from year to year, see *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

a year before the expiration of the current year of the tenancy (*k*); for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began. So that, if the tenant enter on any quarter day, he can quit only on the same quarter day: when once in possession, he has a right to remain for a year: and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year. But in the case of a tenancy from year to year of an agricultural holding, within the meaning of the Agricultural Holdings (England) Act, 1883 (*l*), a year's notice, expiring with a year of tenancy, is now required in order to determine the tenancy, by the 33rd section of the Act: unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply; in which case a half year's notice will be sufficient. This section, however, does not extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (*m*). Under the same Act (*n*), a landlord may give a tenant from year to year notice to quit part only of his holding with a view to the use of the land for any of the improvements specified in the Act; the tenant having the option, by counter notice in writing within twenty-eight days to accept the same as notice to quit the entire holding. This Act does not apply to any holding which is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden; or to any holding let to

Agricultural Holdings (England) Act, 1883.

(*k*) *Right* d. *Flower* v. *Darby*, 1 T. R. 159, 163, 1 R. R. 169: and see *Doe* d. *Bradford* v. *Watkins*, 7 East, 551, 8 R. R. 670.

(*l*) Stat. 46 & 47 Vict. c. 61: see *Barlow* v. *Teal*, 15 Q. B. D. 403, 501.

(*m*) The Agricultural Holdings (England) Act, 1875, repealed by the Act of 1883, contained similar provisions: see stat. 38 & 39 Vict. c. 92, ss. 51, 54—58.

(*n*) Stat. 46 & 47 Vict. c. 61, s. 41. The Act of 1875 contained similar provisions: see stat. 38 & 39 Vict. c. 92, ss. 52, 54—58.

the tenant during his continuance in any office, appointment, or employment held under the landlord (*o*). The parties to a lease from year to year, whether of an agricultural or any other holding, may agree that the tenancy shall be determinable on other terms than those specified in the Agricultural Holdings Act, or implied by the common law; for instance, by three months' notice to be given on any day (*p*). A lease from year to year can be made by parol or word of mouth (*q*), if the rent reserved amount to two-thirds at least of the full improved value of the lands; for if the rent reserved do not amount to so much, the Statute of Frauds declares that such parol lease shall have the force and effect of a lease at will only (*r*). A lease from year to year, reserving a less amount of rent, must be made by deed (*s*). The best way to create this kind of tenancy is to let the lands to hold "from year to year" simply, for much litigation has arisen from the use of more circuitous methods of saying the same thing (*t*).

Lease for a number of years.

A lease for a fixed number of years may, by the Statute of Frauds, be made by parol, if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds, at least, of the full improved value of the land (*u*). Leases for a longer term of years, or at a lower rent, were required by the Statute of Frauds (*x*), to be put into writing and signed by the parties making the same, or their agents thereunto lawfully authorized by writing. But a lease of a

(*o*) Stat. 46 & 47 Vict. c. 61, s. 54. The Act of 1875 applied to agricultural and pastoral holdings of two acres and upwards in extent; see stat. 38 & 39 Vict. c. 92, s. 58.

(*p*) *King* v. *Eversfield*, 1897, 2 Q. B. 475.

(*q*) *Legg* v. *Hackett*, Bac. Abr. Leases (L. 3); *S. C.* nom. *Legg* v. *Strudwick*, 2 Salk. 414.

(*r*) 29 Car. II. c. 3, ss. 1, 2.

(*s*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*t*) See Bac. Abr. Leases (L. 3); *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957.

(*u*) 29 Car. II. c. 3, s. 2; *Lord Bolton* v. *Tomlin*, 5 A. & E. 856.

(*x*) 29 Car. II. c. 3, s. 1.

separate incorporeal hereditament was always required to be made by deed (*y*). And the Real Property Act, 1845, provided that a lease, required by law to be in writing, of any tenements or hereditaments, shall be void *at law*, unless made by deed (*z*). But such a lease, although void as a lease for want of its being by deed, may be good as an agreement to grant a lease, *ut res magis valeat quam pereat* (*a*). And since the Judicature Acts took effect (*b*), it has been held that a tenant in possession of land under an agreement for a lease, which he might enforce specifically under the equitable jurisdiction of the Court (*c*), is to be treated as if he were tenant of the land *at law* upon the terms of the agreement (*d*). A tenant under a mere agreement in writing (*e*), is thus placed practically in the same position as if he had a lease by deed. It does not require any formal words to make a lease for years. The words commonly employed are "demise, lease and to farm let;" but any words indicating an intention to get possession of the lands for a determinate time will be sufficient (*f*). Accordingly, it sometimes happened, previously to the Act of 1845, that what was meant by the parties merely as an agreement to execute a lease, was in law construed as itself an actual lease; and very many lawsuits arose out of the question, whether the effect of a memorandum was in law an actual lease, or merely an agreement to make one. Thus, a mere memorandum in writing that

Leases in writing now required to be by deed.

No formal words required to make a lease.

(*y*) *Bird* v. *Higginson*, 2 A. & E. 696, 6 A. & E. 824; *S. C.* 4 Nev. & Man. 505. See *ante*, pp. 31, 320.

(*z*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

(*a*) *Parker* v. *Taswell*, 4 Jur., N. S., 183, affirmed 2 De G. & J. 559; *Bond* v. *Rosling*, 1 B. & S. 371; *Tidy* v. *Mollett*, 16 C. B., N. S., 298; *Rollason* v. *Leon*, 7 H. & N. 73, overruling *Stratton* v. *Pettitt*, 16 C. B. 420.

(*b*) *Ante*, p. 164.

(*c*) See *ante*, p. 162 & n. (*e*); *Swain* v. *Ayres*, 21 Q. B. D. 289.

(*d*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Furness* v. *Bond*, 4 Times L. R. 457; *Lowther* v. *Heaver*, 41 Ch. D. 248, 264; *Crump* v. *Temple*, 7 Times L. R. 120; see *Foster* v. *Reeves*, 1892, 2 Q. B. 255; *ante*, pp. 183, 184.

(*e*) See *ante*, p. 186.

(*f*) Bac. Abr. Leases (K); *Curling* v. *Mills*, 6 Man. & Gr. 173.

A. agreed to let, and B. agreed to take, a house or farm for so many years, at such a rent, was, if signed by the parties, as much a lease as if the most formal words had been employed (*g*). By such a memorandum a term of years was created in the premises, and was vested in the lessee, immediately on his entry, instead of the lessee acquiring, as at present, merely a right to have a lease granted to him in accordance with the agreement (*h*).

(*g*) *Poole* v. *Bentley*, 12 East, 168; *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; *S. C.* 1 Moo. & Scott, 259; *Warman* v. *Faithfull*, 5 B. & Ad. 1042; *Pearce* v. *Cheslyn*, 4 A. & E. 225.

(*h*) By the Stamp Act, 1891, leases, with some exceptions, are subject to an *ad valorem* duty on the rent reserved as follows :—

	If the term does not exceed 35 Years or is indefinite.		If the term being definite exceeds 35 Years, but does not exceed 100 Years.			If the term being definite exceeds 100 Years.		
	s.	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
Where the yearly rent shall not exceed £5	0	6	0	3	0	0	6	0
Shall exceed £5 and not exceed £10	1	0	0	6	0	0	12	0
,, 10 ,, 15	1	6	0	9	0	0	18	0
,, 15 ,, 20	2	0	0	12	0	1	4	0
,, 20 ,, 25	2	6	0	15	0	1	10	0
,, 25 ,, 50	5	0	1	10	0	3	0	0
,, 50 ,, 75	7	6	2	5	0	4	10	0
,, 75 ,, 100	10	0	3	0	0	6	0	0
And where the same shall exceed £100, then for every £50, and also for any fractional part of £50 .	5	0	1	10	0	3	0	0

And any premium which may be paid for the lease is also charged with the same *ad valorem* duty as on a conveyance upon the sale of lands for the same consideration. The counterpart bears a duty of five shillings, unless the duty on the lease is less than five shillings, in which case the counterpart bears the same duty as the lease; and if not executed by the lessor, it does not require any stamp denoting that the proper duty has been paid on the original. Agreements for leases for any term not exceeding thirty-five years are subject to the same duty as leases. Leases of furnished houses or apartments for any term less than a year, where the rent for such term exceeds 25*l*., are subject to a duty of half-a-crown. And any lease of a dwelling-house or part thereof for any definite term not exceeding a year, at a rent not exceeding the rate of 10*l*. per annum, is now chargeable with the stamp duty of one penny only. Covenants in a lease to make improvements or additions to the property do not subject it to any additional duty. See stat. 54 & 55 Vict. c. 39, ss. 75—78, and 1st schedule, tit. Lease, replacing 33 & 34 Vict. c. 97, ss. 96—100, and schedule, tit. Lease.

A lease may be made for any number of years.

There must be a period fixed for the ending.

There is no limit to the number of years for which a lease may be granted: a lease may be made for 99, 100, 1,000, or any other number of years; the only requisite on this point is, that there be a definite period of time fixed in the lease, at which the term granted must end (*i*); and it is this fixed period of ending which distinguishes a *term* from an estate of freehold. Thus, a lease to A. for his life is a conveyance of an estate of freehold, and must be carried into effect by the proper method for conveying the legal seisin; but a lease to A. for ninety-nine years, if he shall so long live, gives him only a term of years, on account of the absolute certainty of the determination of the interest granted at a given time *fixed in the lease*. Besides the fixed time for the term to end, there must also be a time fixed from which the term is to begin; and this time may, if the parties please, be at a future period (*k*).

A term may be made to commence at a future time.

Thus, a lease may be made for 100 years from next Christmas. For, as leases anciently were contracts between the landlords and their husbandmen, and the interests of tenants for years were treated as lying outside the law of freehold estates (*l*), no objection was made to the tenant's right of occupation being deferred to a future time.

Leases of lands in Middlesex and Yorkshire.

Leases of lands situate in Middlesex or Yorkshire may be avoided, if not registered in the county register, in the same manner as conveyances of freehold estates in such lands (*m*): but leases at a rack rent (*n*) and leases not exceeding twenty-one years when the actual possession and occupation go along with the lease are excepted from the operation of the Middlesex Registry Act (*o*); and the Yorkshire Registries Act, 1884 (*p*), does

(*i*) Co. Litt. 45 b; 2 Black. Comm. 143.

(*k*) 2 Black. Comm. 143.

(*l*) See *ante*, pp. 16—21, 28, 63, 64.

(*m*) *Ante*, p. 206.

(*n*) *Ante*, p. 106, n. (*q*).

(*o*) Stat. 7 Anne, c. 20, s. 17; see Sug. V. & P. 732; 2 Dart. V. & P. 769.

(*p*) Stat. 47 & 48 Vict. c. 54, s. 28. In the old Yorkshire

not extend to any lease not exceeding twenty-one years where accompanied by actual possession from the making of the lease. Leases for forty years or more of lands situate in a district where registration of title is compulsory on sale (*q*) operate only as an agreement and do not pass any legal estate to the lessee unless or until he is registered under the Land Transfer Acts as proprietor of the lease (*r*): but this does not apply to a term created for mortgage purposes (*s*).

Leases of lands in a district where registration of title is compulsory.

When the lease is made, the lessee does not become complete tenant by lease to the lessor until he has entered on the lands let (*t*). Before entry, he has no estate, but only a right to have the lands for the term by force of the lease (*u*), called in law an *interesse termini*. But if the lease should be made by a bargain and sale, or any other conveyance operating by virtue of the Statute of Uses, the lessee will, as we have seen (*x*), have the whole term vested in him at once, in the same manner as if he had actually entered. And registration of a lessee under the Land Transfer Acts, 1875 and 1897 (*y*), as proprietor of the land comprised in the lease appears to vest in him the possession under the lease without any actual entry by him.

Entry.

Interesse termini.

Bargain and sale.

The circumstance, that a lease for years was anciently nothing more than a mere contract, explains a curious point of law relating to the creation of leases for years,

Registry Acts there was the same exception as in the Middlesex Act: stats. 2 & 3 Anne, c. 4, s. 16; 6 Anne, c. 35, s. 29; 8 Geo. II, c. 6, s. 34.

(*q*) *Ante*, pp. 207, 208.

(*r*) Stat. 60 & 61 Vict. c. 65, s. 20 (1), as extended by ss. 22 (6), and the Land Transfer Rules, 1898, Nos. 58—60: see also rules 43—57: *post*, Part VII.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 11, as amended by 60 & 61 Vict. c. 65, First Schedule. A lease containing an *absolute* prohibition against alienation is also excepted: but not a lease containing a prohibition against alienation without the lessor's licence: see *post*, p. 495: Land Transfer Rules, 1898, No. 52.

(*t*) Litt. s. 58: Co. Litt. 46 b: *Miller* v. *Green*, 8 Bingh. 92: *ante*, p. 199.

(*u*) Litt. s. 459: Bac. Abr. Leases (M): *Wallis* v. *Hands*, 1893, 2 Ch. 75.

(*x*) *Ante*, p. 199.

(*y*) Stats. 38 & 39 Vict. c. 87, s. 13, as amended by 60 & 61 Vict.

Lease for years by estoppel.

which does not hold with respect to the creation of any greater interest in land. If a man should by indenture lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be *estopped* during the term, or forbidden to deny the validity of the lease. This might have been expected (*z*). But the law goes further, and holds, that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly-acquired estate of the lessor, and shall become for all purposes a regular estate for a term of years (*a*). If, however, the lessor has, at the time of making the lease, any interest in the lands he lets, such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant (*b*). Thus, if A., a lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies, A. may at law avoid his own lease, though several of the years expressed in the lease may be still to come; for, as A. had an interest in the lands for the life of B., a term of years determinable on B.'s life passed to the lessee. But if in such a case the lease was made for valuable consideration, Equity would oblige the lessor to make good the term out of the interest he had acquired (*c*).

Exception where the lessor has any interest.

Ownership of tenant for years.

As we have seen, a tenant for a term of years has long enjoyed a true property in his holding; for he has the right to maintain or recover possession of his

c. 65, s. 22 (6); Land Transfer Rules, 1898, Nos. 17—52: see *post*, Part VII.

(*z*) See *ante*, p. 149.

(*a*) Co. Litt. 47 b: Bac. Abr. Leases (O); 2 Prest. Abst. 211: *Webb* v. *Austin*, 7 Man. & Gr. 701.

(*b*) Co. Litt. 47 b: *Hill* v. *Saunders*, 4 B. & C. 529: *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728, 730.

(*c*) 2 Prest. Abst. 217.

land during the term against all others, including his landlord (*d*). He also enjoys the right of free disposition of his holding, either by parting with his whole interest therein, which is termed an assignment, or by granting an estate for a shorter term than his own, which is called an underlease (*e*). But he may deprive himself of the power of exercising this right by agreement with his landlord. Thus his lease may have contained a covenant by him not to assign the demised premises without his landlord's licence: in which case he will be prevented from assigning, though not from underletting them without licence (*f*). Or he may have covenanted not to assign or underlet without licence, which will prevent either mode of disposition (*g*). But a disposition of the demised premises, which takes effect as an assignment or underlease in equity only and not at law, is no breach of such a covenant (*h*). With regard to the right of free enjoyment, it appears that, in the absence of express agreement, a tenant for years is liable, equally with a tenant for life, for voluntary waste (*i*): but it is a question whether a tenant for years is not liable, in the matter of permissive waste, at least to keep the demised premises wind and water tight, so as to prevent decay (*k*).

Assignment.

Underlease.

(*d*) *Ante*, pp. 2, 17, 18, 64, n. (*g*); 3 Black. Comm. ch. xi., xii; Bac. Abr. Trespass (C. 2).

(*e*) Bract. 11 b, 326 a; Perk. s. 91; Co. Litt. 46 b; Shep. Touch. 268; Bac. Abr. Leases (L. 3); *Church* v. *Brown*, 15 Ves. 258, 264; Cruise, Dig. iv. 88, 89, 4th ed.; *Buckland* v. *Papillon*, L. R. 1 Eq. 477, 2 Ch. 67.

(*f*) *Crusoe* d. *Blencowe* v. *Bugby*, 2 W. Bl. 766; 15 Ves. 265. By stat. 55 & 56 Vict. c. 13, s. 3, agreements in leases against assigning or underletting without licence shall, unless the lease contain an express provision to the contrary, be deemed to be subject to a proviso that no fine shall be payable for such licence.

(*g*) See 15 Ves. 265; *Bain* v. *Fothergill*, L. R. 7 H. L. 158; Woodfall, Landlord & Tenant, ch. xvii. s. 2, p. 679, 14th ed.

(*h*) *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267; and see *Horsey Estate, Ld.* v. *Steiger*, 1899, 2 Q. B. 79.

(*i*) See *ante*, p. 114; *West Ham, &c.* v. *East London Waterworks Co.*, 1900, 1 Ch. 624. A tenant for years may work open mines: *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454.

(*k*) The old opinion was that a tenant for years was on the same footing with a tenant for life as regards waste, and that both were liable for permissive waste: Litt. s. 71; Co. Litt. 53, 54 a; 2 Inst. 144, 145, 299; 2 Black. Comm. 144, 283. But in modern

But in practice, the rights and liabilities of a tenant for years in respect of his enjoyment of the demised premises are almost always regulated by express agreement. Thus in agricultural leases the tenant generally enters into covenants as to the mode of cultivation of the land; in leases of houses, he usually covenants to repair, and sometimes to paint them also. Covenants restricting the use of the premises, as not to carry on certain trades thereon, or to use the same as a private dwelling-house only, are also met with (*l*).

Rent and covenants in leases.

Leases for years taken for the purpose of occupation are usually made subject to the payment of a yearly rent (*m*); and, as we have seen, they generally contain certain covenants by the lessee, amongst which a covenant to pay the rent is always included. Thus a lease

times conflicting opinions have been expressed as to the liability of a tenant for years for permissive waste: *Herne* v. *Bembow*, 4 Taunt. 764; *Ainsworth* v. *Johnson*, 5 C. & P. 239; *Yellowly* v. *Gower*, 11 Ex. 274, 293, 294; *Woodhouse* v. *Walker*, 5 Q. B. D. 404, 406, 407; *Davies* v. *Davies*, 38 Ch. D. 499, 503, 504; *Re Cartwright*, 41 Ch. D. 532; and, as we have seen, it has now been decided that a tenant for life is not liable for permissive waste; *ante*, p. 115. It may be thought that, on principle, this decision should govern the case of a tenant for years. But it may be pointed out that, anciently, tenants for life and years were equally in the position of farmers, while in modern times tenants for life are usually life-owners rather than farmers: and this difference in their position seems to have been recognized in the modern treatment of the question: see Bewes on Waste, 211 *sq.*; *ante*, pp. 2, n. (*b*), 3, n. (*f*), 42, n. (*g*), 112.

(*l*) Here it may be mentioned that, under an agreement to take a lease with "the usual" covenants, or without specifying the covenants, the lessor can, as a rule, insist on the insertion in the lease of no other covenants by the lessee than covenants (1) to pay rent, (2) to pay taxes, except such as are expressly payable by the lessor, (3) to keep and deliver up the premises in repair, and (4) to allow the lessor to enter and view the state of repair. Leases for particular purposes (as farming, mining or public-house leases) should contain, besides, such covenants and clauses as are usually inserted in similar leases by the custom of the trade or the district. In the absence of express stipulation, the lessor is entitled to have a condition of re-entry on non-payment of rent, but not on breach of covenant. And the lessor is only bound to enter into the usual qualified covenant for quiet enjoyment. See Davidson, Prec. Conv., vol. v. pt. i. pp. 50—54, 3rd ed.; *Hampshire* v. *Wickens*, 7 Ch. D. 555, 561; *Re Anderton & Milner's Contract*, 45 Ch. D. 476; *Re Lander & Bagley's Contract*, 1892, 3 Ch. 41.

(*m*) *Ante*, p. 326.

is a matter partly of transfer of property, partly of contract. As a matter of contract, the lessee's covenant to pay rent and his other covenants remain constantly binding on him during the whole term, notwithstanding any assignment which he may make (*u*). On a sale of leasehold land by the lessee, the purchaser is therefore bound to enter into a covenant to indemnify the vendor against non-payment of the rent and non-observance of the covenants of the lease (*o*). And the assignee of a lease is bound so to indemnify the lessee, even without such a covenant (*p*). The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession (*q*), provided that such covenants relate to the premises let (*r*): and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act (*s*). But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee (*t*). Covenants which are binding on the assignees are said to *run with the land*, the burden of such covenants passing with the

Covenants which run with the land.

(*u*) And the lessee remains liable for the rent, after assignment, even without an express covenant to pay it: but in such a case the lessor will be barred from suing the lessee for rent, if he accept the assignee as his tenant. This is no bar to his suing the lessee on express covenants. See *Walker's case*, 3 Rep. 22, 24; *Barnard* v. *Godscall*, Cro. Jac. 309; *Marsh* v. *Brace*, *ib.* 334; *Brett* v. *Cumberland*, *ib.* 521; *Bachelour* v. *Gage*, Cro. Car. 188; *Norton* v. *Acklane*, *ib.* 580; *Mills* v. *Auriol*, 1 H. Bl. 433, 443, 445, 4 T. R. 94, 98, 2 R. R. 341; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48; *Baynton* v. *Morgan*, 22 Q. B. D. 74.

(*o*) Sug. V. & P. 37. See *Gooch* v. *Clutterbuck*, 1899, 2 Q. B. 148.

(*p*) *Burnett* v. *Lynch*, 5 B. & C. 589; *Moule* v. *Garrett*, L. R. 5 Ex. 132. Not so the underlessee of an assignee: *Bonner* v. *Tottenham, &c., Building Society*, 1899, 1 Q. B. 161.

(*q*) *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238; 3 J. B. Moore, 500; 21 R. R. 585.

(*r*) As do, for example, the covenants specified in note (*l*) to p. 496. *ante*.

(*s*) *Spencer's case*, 5 Rep. 16 a; *Hemingway* v. *Fernandes*, 13 Sim. 228. See *Minshull* v. *Oakes*, 2 H. & N. 793, 809.

(*t*) *Keppel* v. *Bailey*, 2 My. & K. 517.

land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach (*u*). In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet as the latter has become the tenant of the former, a *privity of estate* is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other (*v*). This mutual right is also confirmed by an express clause of the statute before referred to (*x*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases (*y*). By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims (*z*),—an advantage, however, which, in some cases, he is said to have previously possessed (*a*). And with regard to leases made after the year 1881, the Conveyancing Act of 1881 contains further enactments (*b*) annexing the rent reserved and the benefit of the lessee's covenants, having reference to the subject-matter of the lease, to the immediate reversionary estate in the land, and giving a remedy for such rent and covenants to the person entitled, subject to the term, to the income of the same reversionary estate; also laying the obligation of the lessor's covenants, with reference to the subject-matter of the lease, upon the immediate reversionary

(*u*) *Taylor* v. *Shum*, 1 Bos. & Pul. 31, 4 R. R. 759; *Rowley* v. *Adams*, 4 M. & Cr. 534.

(*v*) 3 Rep. 23; *Stevenson* v. *Lambard*, 2 East, 575, 580, 6 R. R. 511; Sugd. Vend. & Pur. 478, note, 3rd ed.

(*x*) Stat. 32 Hen. VIII. c. 34, s. 2.

(*y*) *Ante*, p. 329.

(*z*) 1 Wms. Saund. 240, n. (3); *Martyn* v. *Williams*, 1 H. & N. 817.

(*a*) *Tyrvan* v. *Arthur*, 1 B. & C. 410, 414.

(*b*) Stat. 44 & 45 Vict. c. 41, ss. 10, 11; see Wms. Conv. Stat. 104—110; *Municipal, &c., Building Society* v. *Smith*, 22 Q. B. D. 70.

estate and the person entitled thereto, so far as the lessor has power to bind them; and allotting the like advantage and liability to every part of the reversionary estate, in the case of severance thereof.

Proviso for re-entry.

The payment of the rent and the observance and performance of the covenants are usually further secured by a proviso or condition for re-entry (*c*). The proviso for re-entry, so far as it relates to the non-payment of rent, has been already adverted to (*d*); it enables the landlord or his heirs (and the statutes above mentioned (*e*) enable his assigns), to re-enter on the premises let, and repossess them as if no lease had been made. The landlord, his heirs, or assigns, could formerly, on non-observance of any covenant, at once re-enter in the same way, under the proviso for re-entry on breach of covenant (*f*). And, as a rule, the tenant could obtain no relief in equity against a forfeiture for breach of covenant, other than a covenant to pay money (*g*). A condition for re-entry on breach of covenant thus became a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease was valuable, and the tenant had by mere inadvertence committed some breach of covenant (*h*). But now, by the Conveyancing Act of 1881 (*i*), a right of re-entry or forfeiture under any proviso or stipulation in a lease (*k*)

(*c*) See *ante*, p. 496, n. (*l*).

(*d*) *Ante*, p. 327.

(*e*) Stats. 32 Hen. VIII. c. 34: 44 & 45 Vict. c. 41, ss. 10, 14 (sub-ss. 8): *ante*, pp. 329, 330.

(*f*) *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; *Davis* v. *Burrell*, 10 C. B. 821.

(*g*) *Hill* v. *Barclay*, 18 Ves. 56, 11 R. R. 147; *Nokes* v. *Gibbon*, 3 Drew. 681; *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; *Eastern Telegraph Co. Ld.* v. *Dent*, 1899, 1 Q. B. 835; see *Bamford* v. *Creasy*, 3 Giff. 675; *Bargent* v. *Thomson*, 4 Giff. 473.

(*h*) See note (*f*), *ante*.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 14. This Act repealed stats. 22 & 23 Vict. c. 35, ss. 4—9; 23 & 24 Vict. c. 126, s. 2; which had given power to the Courts, under certain conditions, to relieve against a forfeiture for breach of a covenant or condition to insure against fire.

(*k*) See sects. 14, sub-s. 3; *Swain* v. *Ayres*, 21 Q. B. D. 289. By stat. 55 & 56 Vict. c. 13, s. 5, the benefit of these provisions is extended to agreements for a lease or underlease.

for a breach of any covenant or condition in a lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (*l*) specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach (*m*), and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*n*). And where the lessor is proceeding to enforce such a right of re-entry, the Court is authorized, on the application of the lessee (*o*), to grant relief against such a forfeiture, if and upon such terms as the Court, under the circumstances of the case, shall think fit. But such relief cannot be obtained after the lessor has actually recovered possession of the premises, whether by entry or action (*p*). These provisions apply to all leases, whatever their date, and have effect notwithstanding any stipulation to the contrary. But they do not affect the law relating to re-entry or forfeiture, or relief in case of non-payment of rent (*q*). Nor do they apply to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased (*r*); nor,

(*l*) As to the form of notice required, see *Fletcher* v. *Noakes*, 1897, 1 Ch. 271; *Re Serle*, 1898, 1 Ch. 652; *Pannell* v. *City, &c., Brewery Co.*, 1900, 1 Ch. 496; *Jacob* v. *Down*, 1900, 2 Ch. 156.

(*m*) See *Lock* v. *Pearce*, 1893, 2 Ch. 271.

(*n*) See *North London, &c., Co.* v. *Jacques*, 49 L. T. 659; *Jacques* v. *Harrison*, 12 Q. B. D. 136. 165; *Greenfield* v. *Hanson*, 2 Times L. R. 876; *Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 542; stat. 55 & 56 Vict. c. 13, s. 2 (1); *Penton* v. *Barnett*, 1897, 1 Q. B. 276.

(*o*) See stat. 44 & 45 Vict. c. 11, s. 14 (3); *Burt* v. *Gray*, 1891, 2 Q. B. 98. Stat. 55 & 56 Vict. c. 13, s. 4, enables the Court to relieve an under-lessee against a forfeiture incurred by the original lessee; *Cholmeley School*, *Highgate* v. *Sewell*, 1893, 2 Q. B. 254, & 1894, 2 Q. B. 906; *Nind* v. *Nineteenth Century Building Socy.*, 1894, 2 Q. B. 226; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218.

(*p*) *Quilter* v. *Mapleson*, 9 Q. B. D. 672, 677; *Rogers* v. *Rice*, 1892, 2 Ch. 170.

(*q*) *Ante*, pp. 327—329.

(*r*) *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; see *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.

in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof. A condition for forfeiture on the lessee's bankruptcy, or on the taking in execution of his interest, was also excepted from the Act. But by the Conveyancing Act, 1892 (*s*), such a condition is only to be excepted from the operation of the above provisions after one year from the date of the bankruptcy or execution, and provided the lessee's interest be not sold within the year. Such a condition is, however, to remain an unqualified exception from the above provisions of the Act of 1881 if contained in a lease of (1) agricultural or pastoral land: (2) mines or minerals; (3) a public-house or beershop; (4) a dwelling-house let furnished; or (5) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or any person holding under him.

Effect of licence for breach of covenant.

At common law, the proviso for re-entry on breach of covenants was the subject of a curious doctrine: that if an express licence were once given by the landlord for the breach of any covenant, or if the covenant were, not to do a certain act without licence, and licence were once given by the landlord to perform the act, the right of re-entry was gone for ever (*t*). The ground of this doctrine was, that every condition of re-entry was entire and indivisible; and, as the condition had been waived once, it could not be enforced again. So far as this reason extended to the breach of any covenant, it was certainly intelligible; but its application to a licence to

(*s*) Stat. 55 & 56 Vict. c. 13, s. 2 (2); *Horsey Estate, Ld.* v. *Steiger*, 1899, 2 Q. B. 79.

(*t*) *Dumpor's case*, 4 Rep. 119; *Brummell* v. *Macpherson*, 14 Ves. 173.

perform an act, which was only prohibited when done *without* licence, was not very apparent (*u*). This rule, which was well established, was frequently the occasion of great inconvenience to tenants: for no landlord could venture to give a licence to do any act, which might be prohibited by the lease unless done with licence, for fear of losing the benefit of the proviso for re-entry, in case of any future breach of covenant (*x*). But in 1859 this inconvenient doctrine was removed by Lord St. Leonards' Act (*y*); and the giving of any such licence no longer prevents the enforcement of the landlord's right of re-entry for any breach of covenant not authorized or avoided by the licence. This Act, however, failed to provide for the case of an actual waiver of a breach of covenant. On this point the law stood thus. The receipt of rent by the landlord, after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was an implied waiver of the right of re-entry (*z*); but if the breach was of a continuing kind, this implied waiver did not extend to the breach which continued after the receipt (*a*). An implied waiver of this kind did not destroy the condition of re-entry (*b*); but an actual waiver had this effect. Few landlords, therefore, were disposed to give an actual waiver. This

Waiver of a breach of covenant.

Implied waiver.

Continuing breach.

Actual waiver.

(*u*) 4 Jarman's Conveyancing, by Sweet, 377, n. (*c*).

(*x*) The only method to be adopted in such a case was, to create a fresh proviso for re-entry on any future breach of the covenants, a proceeding which was, of course, attended with expense. The term would then, for the future, have been determinable on the new events stated in the proviso: and there was no objection in point of law to such a course: for a term, unlike an estate of freehold, may be made determinable during its continuance, on events which were not contemplated at the time of its creation. See 2 Prest. Conv. 199.

(*y*) Stat. 22 & 23 Vict. c. 35, ss. 1, 2. By stat. 8 & 9 Vict. c. 99, s. 5, the doctrine had ceased to extend to licences granted to the tenants of Crown lands.

(*z*) Co. Litt. 211 b; *Price* v. *Worwood*, 4 H. & M. 512; *Jacob* v. *Down*, 1900, 2 Ch. 156.

(*a*) *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; *Doe* d. *Baker* v. *Jones*, 5 Ex. 498; *Penton* v. *Barnett*, 1898, 1 Q. B. 276; *Jacob* v. *Down*, *ubi sup.*

(*b*) *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428.

inconvenience was met by a subsequent Act (*c*), providing that in future any actual waiver by the lessor, in any particular instance, of the benefit of any covenant or condition in any lease, should not be deemed to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect should appear.

Severance of reversion.

At common law, too, a grantee of the reversion of part of the property comprised in a lease could not take advantage of a condition of re-entry or other condition contained in the lease; as if a lease had been made of three acres, reserving a rent upon condition, and the reversion of two acres were granted, the rent might be apportioned, but the condition was destroyed, "for that it is entire and against common right" (*d*). The law on this point was partially altered by Lord St. Leonards' Act, which provides (*e*) that where the reversion upon a lease is severed, and the rent is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent belonging to him, have the benefit of all conditions of re-entry for non-payment of the original rent. It will be observed that this enactment does not affect conditions of re-entry on breach of covenants; also that it can only take effect, if the rent be legally apportioned. Rent can only be legally apportioned by the consent of the tenant to the apportionment, or by the verdict of a jury (*f*). But with regard to leases made after the year 1881, the common law rule is altogether abolished by the Conveyancing Act of 1881 (*g*), which provides that every condition or right of re-entry and every other condition contained in

(*c*) Stat. 23 & 24 Vict. c. 38, s. 6.

(*d*) Co. Litt. 215 a. See as to coparceners, *Doe* d. *De Rutzen* v. *Lewis*, 5 A. & E. 277.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 3.

(*f*) *Bliss* v. *Collins*, 5 B. & A. 876. See *ante*, p. 425.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 12; see also s. 10.

such leases shall, on the severance of the reversionary estate in the land leased, be apportioned and remain annexed to the several parts of the reversionary estate as severed.

Statute of Frauds required writing to assign a lease.

It was provided by the Statute of Frauds (*h*), that no leases, estates, or interests, not being copyhold or customary interests, in any lands, tenements, or hereditaments, should be assigned, unless by deed or note in writing, signed by the party so assigning or his agent thereunto lawfully authorized by writing, or by act or operation of law. And now, by the Real Property Act, 1845 (*i*), an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed (*k*).

A deed now required.

Lands in Middlesex or Yorkshire.

With regard to lands in Middlesex or Yorkshire, assignments of such leases thereof as require registration (*l*) are voidable, if not registered, in the same manner as conveyances of the freehold estate (*m*); and so are assignments of leases for twenty-one years or under, if the assignment be not accompanied with delivery of the actual possession of the demised land (*n*). And an assignment on sale (*o*) of a lease capable of registration (*p*), and having at least forty years to run of land situate in a district where registration of title is compulsory (*q*) operates only as an agreement, and does not pass any legal estate to the assignee unless or until he is registered as the proprietor of the lease (*r*). But

Assignments of leases in a district where registration of title is compulsory.

(*h*) 29 Car. II. c. 3, s. 3.

(*i*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*k*) Any assignment of a lease upon any other occasion than a sale or mortgage appears now to be subject to a deed stamp of 10*s.*: stat. 54 & 55 Vict. c. 39, replacing 33 & 34 Vict. c. 97.

(*l*) *Ante*, p. 20.

(*m*) *Ante*, p. 206.

(*n*) Sug. V. & P. 732; 2 Dart, V. & P. 769; stat. 47 & 48 Vict. c. 54, s. 28.

(*o*) *Ante*, p. 208, n. (*l*).

(*p*) *Ante*, p. 492.

(*q*) *Ante*, p. 208.

(*r*) Stat. 60 & 61 Vict. c. 65, s. 20, as extended by ss. 22 (6), 24, and Land Transfer Rules, 1898, Nos. 58—60; see *post*, Part VII.

this does not appear to affect an assignment on sale of a term originally created for mortgage purposes (*s*).

Will of leaseholds.

Leasehold estates, being chattels, could always be bequeathed by will (*t*). And, as we have seen (*u*), they devolve in the first place on the executors of the will, in the same manner as other personal estate; or, on the decease of their owner intestate, they will pass to his administrator. And an executor or administrator has the same power of disposing of any term of years so vested in him, in order to raise money to pay debts, expenses, or (in the case of a will) legacies, as he has with regard to the deceased person's other chattels (*x*). Specific bequests of leasehold estates are subject to the executor's assent in the same manner as like bequests of other chattels (*y*). It was formerly a rule that where a man had lands in fee simple, and also lands held for a term of years, and devised by his will all his lands and tenements, the fee simple lands only passed by the will, and not the leaseholds; but if he had leasehold lands, and none held in fee simple, the leaseholds would then pass, for otherwise the will would be merely void (*z*). But the Wills Act of 1837 (*a*) now provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates

General devise.

Wills Act.

(*s*) *Ante*, p. 486.
(*t*) *Ante*, p. 20.
(*u*) *Ante*, pp. 20, 21, 215.
(*x*) *Ante* p. 215.
(*y*) *Ante*, p. 217.
(*z*) *Rose* v. *Bartlett*, Cro. Car. 292; see *ante*, p. 22.
(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 26. See *Wilson* v. *Eden*, 5 Exch. 752, 18 Q. B. 474, 16 Beav. 153; *Prescott* v. *Barker*, L. R. 9 Ch. 174. Stat. 22 & 23 Vict. c. 35, s. 27, contains a provision for the exoneration of the executors or administrators of a lessee from liability to the rents and covenants of the lease, similar to that to which we have already referred with respect to their liability to rents-charge in con-

Exoneration of executors and administrators of lessee.

of the testator, or his leasehold estates to which such description shall extend, as well as freehold estates, unless a contrary intention shall appear by the will.

Alienation for debt.

As chattels, leasehold estates have always been liable to alienation for the tenant's debts, both during his life in execution of a judgment against him (*b*), and after his death (*c*). On a judgment against a tenant for years, his term may be seized and sold by the sheriff as a chattel under the writ of *fieri facias* (*d*). And by the old law, execution might be had under the writ of *elegit* (*e*) of the whole of a debtor's term, as a chattel, or of half of it, as land (*f*). But at common law, judgments were no more binding on lands held for a term of years than on other chattels (*g*); which, by the Statute of Frauds, were not bound by judgments until a writ of execution was actually in the hands of the sheriff or his officer (*h*). By the Judgments Act, 1838, lands held for a term were made liable to judgments against the tenant in the same manner as freehold lands (*i*): but by the Judgments Act, 1839, as against purchasers without notice of any judgments, such judgments were to have no further effect than they would have had under the old law (*k*). And the before-mentioned Acts of 1860, 1864 and 1888, reducing the lien of judgments, applied to leaseholds equally with freeholds (*l*). The Land Charges Act,

veyances on rents-charge; see *ante*, p. 126, n. (*k*): *Re Green*, 2 De Gex, F. & J. 124.

(*b*) Bac. Abr. Execution (C. 2. 4).

(*c*) *Ante*, pp. 20, 21.

(*d*) 4 Rep. 74: *Taylor* v. *Cole*, 3 T. R. 292, 1 R. R. 706; see *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; *ante*, p. 262.

(*e*) *Ante*, p. 262, and note (*b*).

(*f*) 8 Rep. 171: Bac. Abr. Execution (C. 2).

(*g*) 8 Rep. 171: *Shirley* v. *Watts*, 3 Atk. 200.

(*h*) Stat. 29 Car. II. c. 3, s. 16. See Wms. Pers. Prop. 96, 97, 14th ed.

(*i*) *Ante*, pp. 264, 265; *Johns* v. *Pink*, 1900, 1 Ch. 296.

(*k*) Stat. 2 & 3 Vict. c. 11, s. 5: *Westbrook* v. *Blythe*, 3 E. & B. 737. And if leaseholds should be considered to be *goods* within the meaning of stat. 19 and 20 Vict. c. 97, s. 1, then a purchaser without notice was thereby protected, if he acquired title at any time before an actual seizure under the writ.

(*l*) *Ante*, pp. 265—267.

1900 (*m*), has repealed these provisions of the Judgments Act, 1839, and the Acts of 1860 and 1864, as from the 1st of July, 1901: but, as we have seen, no judgment shall thenceforward operate as a charge on land unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Act of 1888 (*n*). By the common law, terms of years are not bound by the tenants' debts to the Crown, until award of execution against him (*o*). And purchasers of terms were further protected by the before-mentioned provision of the Crown Suits Act of 1865 (*p*); and from the 1st of July, 1901, they will have the protection given by the Land Charges Act, 1900 (*q*). Terms have always been liable to alienation for debt on the tenant's bankruptcy (*r*). But as leases for years, by reason of their rent and covenants, are sometimes more burdensome than profitable, under the old bankrupt law, a bankrupt's term did not vest in his assignees (who occupied a position similar to that of the present creditor's trustee) without their acceptance of it (*s*). As we have seen, under the Bankruptcy Act, 1883, when a debtor is adjudged bankrupt, the whole of his property vests at once in the trustee for the purposes of the Act (*t*). But the trustee may, within the time and under the conditions specified in the Act, disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants: although he is not entitled, as a rule, to disclaim a lease without the leave of the Court (*u*). In the event of a

Crown debts.

Bankruptcy.

Disclaimer of leaseholds by trustee in bankruptcy.

(*m*) Stat. 63 & 64 Vict. c. 26, s. 5; *ante*, p. 267.

(*n*) Sect. 2; *ante*, p. 267.

(*o*) *Fleetwood's case*, 8 Rep. 171; 13 Price, 659; Chitty, Prerogative of the Crown, 284, 297, 298.

(*p*) *Ante*, p. 279.

(*q*) *Ante*, pp. 279, 280.

(*r*) *Ante*, p. 271.

(*s*) Bac. Abr. Bankrupt (F).

(*t*) *Ante*, p. 271. If the debtor acquire any leaseholds *after* his bankruptcy but before his discharge, he may make a valid disposition of them to any one dealing with him in good faith and for value, either with or without notice of the bankruptcy, before the trustee intervenes; *Re Clayton & Barclay's Contract*, 1895, 2 Ch. 212; Wms. Pers. Prop. 262, 15th ed.

(*u*) See stat. 46 & 47 Vict.

disclaimer by the trustee of the bankrupt's leasehold property the Court may, under the conditions specified in the Act, make an order vesting the same in any other person entitled thereto (*x*).

Underlease.

It has been mentioned (*y*) that a tenant for years may, unless restrained by express covenant, make an assignment of his whole term, or an underlease for any part thereof. Any assignment for less than the whole term is in effect an underlease (*z*). On the other hand, any assurance purporting to be an underlease, but which comprises the whole term, is, by the better opinion, in effect an assignment (*a*). It is true that in some cases, where a tenant for years, having less than three years of his term to run, has orally agreed with another person to transfer the occupation of the premises to him for the rest of the term, he paying an equivalent rent, this has been regarded as an underlease, and so valid (*b*), rather than as an attempted assignment which would be void, formerly for want of a writing (*c*), and now for want of a deed (*d*). It is, however, held that no distress can be made for the rent thus reserved (*e*). But if a tenure be created, the lord, if he have no estate, must at least have a seignory (*f*), to which the

Underlease for the whole term.

No distress can be made.

c. 52, s. 55, amended by 53 & 54 Vict. c. 71, s. 13; Bankruptcy Rules, 1890, No. 69.

(*x*) Stat. 46 & 47 Vict. c. 52, s. 55, sub-s. 6, amended by 53 & 54 Vict. c. 71, s. 13; *Re Finley*, 21 Q. B. D. 475; *Re Morgan*, 22 Q. B. D. 592; *Re Smith, Ex parte Hepburn*, 25 Q. B. D. 536.

(*y*) *Ante*, p. 495.

(*z*) See Sugd. Concise Vendors, 482; *Cottee* v. *Richardson*, 7 Ex. 143.

(*a*) *Palmer* v. *Edwards*, 1 Doug. 187, n.; *Parmenter* v. *Webber*, 8 Taunt. 593, 20 R. R. 575; 2 Prest. Conv. 124; *Thorn* v. *Woolcombe*, 3 B. & Ad. 586; *Langford* v. *Selmes*, 3 K. & J. 220, 227; *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198, 210; *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

(*b*) *Poultney* v. *Holmes*, 1 Strange, 405; *Preece* v. *Corrie*, 5 Bing. 27; *Pollock* v. *Stacy*, 9 Q. B. 1033.

(*c*) Stat. 29 Car. II. c. 3, s. 3; *ante*, p. 504.

(*d*) Stat. 8 & 9 Vict. c. 106, s. 3; *ante*, p. 504.

(*e*) Bac. Abr. tit. Distress (A); —— v. *Cooper*, 2 Wilson, 375; *Preece* v. *Corrie*, 5 Bing. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898.

(*f*) *Ante*, p. 409.

rent would by law be incident: and being thus rent service, it must by the common law be enforceable by distress (*g*). The very fact, therefore, that no distress can be made for the rent by the common law, shows that there can be no tenure between the parties. And, if so, the attempted disposition cannot operate as an underlease (*h*). If, however, the disposition be by deed, and be executed by the alienee, it has been decided that the reservation of rent may operate to create a rent-charge (*i*), for which the owner may sue (*k*), and which he may assign, so as to entitle the assignee to sue in his own name (*l*). And if this be so, there seems no good reason why, under these circumstances, the statutory power of distress given to the owner of a rent seek (*m*) should not apply to the rent thus created (*n*). But on this point also opinions differ (*o*). If such a rent be created after the year 1881, it would appear to be recoverable by means of the remedies conferred by the 44th section of the Conveyancing Act, 1881 (*p*).

No privity between the lessor and the underlessee.

Every underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee, no *privity* is said to exist. Thus the original lessor cannot maintain any action against an underlessee for any breach of the covenants contained in the original lease (*q*). His

(*g*) Litt. sect. 213.

(*h*) *Barrett* v. *Rolph*, 14 M. & W. 348, 352.

(*i*) *Ante*, p. 417.

(*k*) *Baker* v. *Gostling*, 1 Bing. N. C. 19.

(*l*) *Williams* v. *Hayward*, 1 E. & E. 1040.

(*m*) Stat. 4 Geo. II. c. 28, s. 5; *ante*, pp. 416, 421.

(*n*) *Pascoe* v. *Pascoe*, 3 Bing. N. C. 905.

(*o*) See —— v. *Cooper*, 2 Wils. 375; *Langford* v. *Selmes*, 3 K. & J. 220; *Smith* v. *Watts*, 4 Drew. 338; *Wills* v. *Cutting*, 7 W. R. 448; Burton's Compendium, pl. 1111.

(*p*) Stat. 44 & 45 Vict. c. 41; *ante*, p. 421.

(*q*) *Holford* v. *Hatch*, 1 Dougl. 183. If, however, the lease contain covenants restricting the use of the land, an underlessee, being held to have constructive notice of his lessor's title, may be restrained from contravening the covenants, under the doctrine permitting restrictions as to the use of land to be a burden on the land in equity; *ante*, p. 185; *Patman* v. *Harland*, 17 Ch. D. 353;

Derivative term is not an estate in original term.

remedy is only against the lessee, or any assignee from him of the whole term. The derivative term, which is vested in the underlessee, is not an estate in the interest originally granted to the lessee: it is a new and distinct term, for a different, because a less, period of time. It certainly arises and takes effect out of the original term, and its existence depends on the continuance of such term, but still, when created, it is a distinct chattel, in the same way as a portion of any moveable piece of goods becomes, when cut out of it, a separate chattel personal.

Lands in Middlesex or Yorkshire.

In Middlesex or Yorkshire, underleases and assignments thereof are voidable, if not registered, in the same manner and with the like exceptions as leases from the freeholder and assignments of such leases (*r*).

Lands in a compulsory registration.

And the provisions of the Land Transfer Act, 1897 (*s*) with respect to compulsory registration apply to underleases and assignments thereof in like manner and with the like exceptions as to leases from the freeholder and assignments of the same (*t*).

Husband's rights in his wife's term at common law.

By the common law, if a married woman were possessed of a term of years, her husband might dispose of it at any time during the coverture, either absolutely or by way of mortgage (*u*); and if he survived her, he became entitled to it by his marital right (*x*). But if he died in her lifetime, it survived to her, and his will alone was not sufficient to deprive her of it (*y*).

Wife's equitable interest in a term of years.

And if a trustee were possessed of a term of years on trust for a married woman, equity gave her husband similar

John, &c., Co. v. *Holmes*, 1900. 1 Ch. 188: see *Hall* v. *Ewin*, 37 Ch. D. 74.

(*r*) *Ante*, pp. 492, 504.

(*s*) Stat. 60 & 61 Vict. c. 65, s. 20; *ante*, p. 208.

(*t*) Sects. 22 (6), 24, and First Schedule: Land Transfer Rules, 1898, Nos. 58—60.

(*u*) *Hill* v. *Edmonds*, 5 De Gex & S. 603, 607.

(*x*) Co. Litt. 46 b, 351 a: see *ante*, p. 390; Wms. Conv. Stat. 374, 375, 452.

(*y*) 2 Black. Comm. 434: 1 Rop. Husb. & Wife, 173, 177: *Doe* d. *Shaw* v. *Steward*, 1 A. & E. 300.

rights over her equitable interest therein (*z*); subject however to the assertion by the wife of her equity to a settlement, or right to have a provision secured for herself and her children by settlement of the rents and profits of the term, or part thereof, on trust for that purpose (*a*). But if the trust were for the wife's separate use, she was entitled to enjoy and dispose of her interest as fully as if she were a feme sole (*b*). And now, if a term of years or any equitable interest therein belong to a married woman as her separate property under the Married Women's Property Act, 1882, she will be entitled to hold and dispose of the same in the same manner as if she were a feme sole (*c*).

Wife's equity to a settlement.

In many cases landlords, particularly corporations, are in the habit of granting to their tenants fresh leases, either before or on the expiration of existing ones. In other cases a covenant is inserted to renew the lease on payment of a certain fine for renewal: and this covenant may be so worded as to confer on the lessee a perpetual right of renewal from time to time as each successive lease expires (*d*). In all these cases the acceptance by the tenant of the new lease operates as a surrender in law of the unexpired residue of the old term; for the tenant by accepting

Renewable leases.

Surrender in law.

(*z*) *Donne* v. *Hart*, 2 R. & M. 360; *Re Bellamy, Elder* v. *Pearson*, 25 Ch. D. 620; see *Duberly* v. *Day*, 16 Beav. 33, 16 Jur. 581.

(*a*) *Hanson* v. *Keating*, 4 Hare, 1; see Wms. Pers. Prop. 473, 15th ed.

(*b*) See *ante*, pp. 306—309. The Married Women's Property Act, 1870 (stat. 33 & 34 Vict. c. 93, s. 7, now repealed, see *ante*, p. 309), provided that, where any woman married after the passing of the Act (9th Aug. 1870) should during her marriage become entitled to any personal property (which would seem to include leaseholds) as next of kin or one of the next of kin of an intestate, such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to her for her separate use.

(*c*) Stat. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 1), 2, 5; *ante*, pp. 310—313; see Wms. Conv. Stat. 382, 383, 418, 421.

(*d*) *Iggulden* v. *May*, 9 Ves. 325, 7 East, 237, 8 R. R. 623; *Hare* v. *Burges*, 4 K. & J. 45.

the new lease affirms that his lessor has power to grant it: and as the lessor could not do this during the continuance of the old term, the acceptance of such new lease is a surrender in law of the former. But if the new lease be void, the surrender of the old one will be void also; and if the new lease be voidable, the surrender will be void if the new lease fail (*e*). It appears to be now settled, after much difference of opinion, that if a new lease be granted to another person with the consent of the tenant, who gives up possession of the premises, that is an implied surrender of the old term (*f*). Whenever a lease, renewable either by favour or of right, is settled in trust for one person for life with remainders over, or in any other manner, the benefit of the expectation or right of renewal belongs to the persons from time to time beneficially interested in the lease: and if any other person should, on the strength of the old lease, obtain a new one, he will be regarded in equity as a trustee for the persons beneficially interested in the old one (*g*). So the costs of renewal are apportioned between the tenant for life and remaindermen according to their respective periods of actual enjoyment of the new lease (*h*).

(*e*) *Ire's case*, 5 Rep. 11 b: *Roe* d. *Earl of Berkeley* v. *Archbishop of York*, 6 East, 86. 8 R. R. 413: *Doe* d. *Earl of Egremont* v. *Courtenay*, 11 Q. B. 702: *Doe* d. *Biddulph* v. *Poole*, 11 Q. B. 713.

(*f*) See *Lyon* v. *Reed*, 13 M. & W. 285, 306: *Creagh* v. *Blood*, 3 Jones & Lat. 133, 160: *Nickells* v. *Atherstone*, 10 Q. B. 944; *M'Donnell* v. *Pope*, 3 Hare, 705; *Davison* v. *Gent*, 1 H. & N. 744: *Wallis* v. *Hands*, 1893, 2 Ch. 75: cf. *ante*, p. 156, n. (*s*).

(*g*) *Rawe* v. *Chichester*, Ambl. 715: *Giddings* v. *Giddings*, 3 Russ. 241; *Tanner* v. *Elworthy*, 4 Beav. 487; *Clegg* v. *Fishwick*, 1 Mac. & G. 294. See *ante*, p. 181.

(*h*) *White* v. *White*, 5 Ves. 554, 9 Ves. 560, 4 R. R. 161: *Allan* v. *Backhouse*, 2 V. & B. 65, Jac. 631, 13 R. R. 23, 23 R. R. 167: *Greenwood* v. *Evans*, 4 Beav. 44: *Jones* v. *Jones*, 5 Hare, 440: *Hadlestone* v. *Whelpdale*, 9 Hare, 775: *Ainslie* v. *Harcourt*, 28 Beav. 313: *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711: *Re Baring*, 1893, 1 Ch. 61. Special provisions have been made by Parliament for facilitating the procuring and granting of renewals of leases when any

Compensation to tenants for their improvements.

Before the year 1876 the tenant of an agricultural holding had no right to exact compensation from his landlord for any improvements (*i*) which he might have made during his tenancy; except under an express agreement with the landlord or by virtue of the custom of the country where the holding lay (*k*). An Act of 1875 (*l*) made provision for the compensation of tenants of agricultural holdings for improvements made by them. But the operation of that Act might be excluded by agreement between landlord and tenant (*m*); and in practice this was usually done. The Act was repealed by the Agricultural Holdings (England) Act, 1883 (*n*): and the law is now mainly regulated by that Act as amended by the Agricultural Holdings Act, 1900 (*o*). Under these Acts, where the tenant (*p*) of a holding, to

of the parties are infants, idiots or lunatics; also for enabling trustees of renewable leaseholds to renew the leases, and to raise money by mortgage to pay for such renewal. A statute of the year 1860 made provision for facilitating the purchase by trustees of renewable leaseholds of the reversion of the land, when it belongs to an ecclesiastical corporation, and for raising money for that purpose by sale or mortgage; also for the exchange of part of the lands, comprised in any renewable lease, for the reversion in other part of the same lands, so as thus to acquire the entire fee simple in a part of the lands instead of a renewable lease of the whole. As we have seen, capital money arising under the Settled Land Act, 1882, may be applied in purchase of the reversion or freehold in fee of any settled leasehold land; and the tenant for life now has power to exchange any part of the settled land for other land. See stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 14—18, 20, 21; 53 Vict. c. 5, ss. 116, 120—124; 56 & 57 Vict. c. 53, s. 19; replacing 51 & 52 Vict. c. 59, ss. 10, 11; 23 & 24 Vict. c. 124, ss. 35—39; *ante*, pp. 121—123.

(*i*) As to the removal of buildings and fixtures erected by a tenant for agricultural purposes, see Wms. Pers. Prop. 130, 15th ed.

(*k*) See *Hutton* v. *Warren*, 1 M. & W. 466; notes to *Wigglesworth* v. *Dallison*, 1 Smith, L. C.: Woodfall on Landlord and Tenant, ch. xx., sects. 4, 5, pp. 774 *sq.*, 14th ed.: *Bradburn* v. *Foley*, 3 C. P. D. 129, 134.

(*l*) Stat. 38 & 39 Vict. c. 92, amended by stat. 39 & 40 Vict. c. 74.

(*m*) See stat. 38 & 39 Vict. c. 92, ss. 54—57.

(*n*) Stat. 46 & 47 Vict. c. 61, amended by 50 & 51 Vict. c. 26; 53 & 54 Vict. c. 57; and 58 & 59 Vict. c. 27 (as to market gardens).

(*o*) Stat. 63 & 64 Vict. c. 50, which came into operation on the 1st Jan., 1901, s. 13. By s. 7, compensation for an improvement previously made shall be such (if any) as might have been claimed if the Act had not been passed.

(*p*) In these Acts "tenant" means the holder of land under

which the Acts apply (*q*), has made thereon any improvement of the kind specified in the Acts, he is entitled on quitting his holding at the determination of his tenancy to obtain from the landlord, as compensation under these Acts for such improvement, such sum as fairly represents the value of the improvement to an incoming tenant (*r*). Compensation is not payable under these Acts for the erection of buildings and other permanent improvements specified in the Acts, unless executed with the consent in writing of the landlord or his agent previously obtained (*s*); or for drainage, unless the tenant has complied with the conditions of the Acts in giving to the landlord or his agent due notice of intention to execute such an improvement (*t*). But compensation may be obtained for the improvement of the land by the application of purchased manure and in other ways described in the Acts, although the consent of the landlord should not have been obtained (*u*). For improvements of the kind last mentioned, fair and reasonable compensation, payable under an agreement in writing, may be substituted for compensation under the Acts (*x*).

a landlord for a term of years, or for lives, or for lives and years, or from year to year; stats. 46 & 47 Vict. c. 61, s. 61: and 63 & 64 Vict. c. 50, s. 9 (2).

(*q*) See stat. 46 & 47 Vict. c. 61, s. 54, *ante* p. 488. Stat. 50 & 51 Vict. c. 26 secures to the tenants of allotments of not more than two acres cultivated as a farm or garden compensation for crops left in the ground at the end of their tenancies.

(*r*) The amount and mode and time of payment of compensation is to be settled by agreement, or by arbitration as prescribed by the Acts in case of difference: and claims by a tenant entitled to compensation under custom, agreement or otherwise for any improvement specified in the Acts are to be adjusted in the same way; stat. 63 & 64 Vict. c. 50, s. 2.

(*s*) Stats. 46 & 47 Vict. c. 61, s. 3; 63 & 64 Vict. c. 50, s. 1 (2), and First Schedule, Part I.

(*t*) Stats. 46 & 47 Vict. c. 61, s. 4; 63 & 64 Vict. c. 50; s. 1 (2), and First Schedule, Part II.

(*u*) See stat. 63 & 64 Vict. c. 50, and First Schedule, Part III. Special provisions are made as to compensation for improvements begun during the last year of tenancy; see stat. 46 & 47 Vict. c. 61, s. 59.

(*x*) Stats. 46 & 47 Vict. c. 61, s. 5; 63 & 64 Vict. c. 50, ss. 1 (2), 9 (2). And in the case of a tenancy under a contract of tenancy current at the commencement of the Act of 1883, where any agreement in writing, or custom, or the Act of 1875, provides specific compensation for any improvement described in the Act of 1883, compensation in respect of

But any agreement made by a tenant, by virtue of which he is deprived of his right to claim compensation under these Acts in respect of any improvement described therein (except an agreement providing such compensation as is by the Acts permitted to be submitted for compensation under the Acts) is void, both at law and in equity, so far as it deprives him of such right (*y*).

Power to charge holding with repayment.

A landlord, on paying compensation under these Acts, or compensation authorized by these Acts to be substituted therefor, or on expending such an amount as may be necessary to execute an improvement by drainage, which the landlord has undertaken to execute himself in accordance with the Acts (*z*), may obtain an order from the Board of Agriculture charging the holding, or any part thereof, with the repayment of the amount paid or expended with such interest and by such instalments, and with such directions for giving effect to the charge, as the Board thinks fit (*a*). Such a charge must now be registered in the office of Land Registry in order to be valid as against a purchaser for value of the land, in the same manner as a land improvement rent-charge (*b*). Where the landlord is entitled as trustee, or otherwise than for his own benefit, compensation is not recoverable against him personally, but may be recovered by means of a charge on the holding obtained by the tenant in his own favour from the Board of Agriculture (*c*). Under the Act of 1900 (*d*), similar

Trustee landlord.

such improvement is to be payable in pursuance of such agreement, custom, or Act of 1875, in substitution for compensation under the Act of 1883.

(*y*) Stat. 46 & 47 Vict. c. 61, s. 55.

(*z*) See stat. 46 & 47 Vict. c. 61, s. 4.

(*a*) Stats. 46 & 47 Vict. c. 61, s. 29 (see also ss. 30—32); 63 & 64 Vict. c. 50, s. 3; *Gough* v. *Gough*, 1891, 2 Q. B. 665. The Act of 1875 contained similar provisions.

(*b*) Stats. 51 & 52 Vict. c. 51, ss. 4, 12, 13; 63 & 64 Vict. c. 50, s. 3 (4), *ante*, p. 418.

(*c*) Stats. 46 & 47 Vict. c. 61, s. 31; 63 & 64 Vict. c. 50, s. 3. Such a charge must be registered in the same manner as a landlord's charge.

(*d*) Stat. 63 & 64 Vict. c. 50, s. 3 (3).

charges may be made where compensation for any improvement specified in the Act has been claimed under custom or agreement or otherwise.

Long terms of years.

We now come to consider those long terms of years of which frequent use is made in conveyancing, generally for the purpose of securing the payment of money. For this purpose it is obviously desirable that the person who is to receive the money should have as much power as possible of realizing his security, whether by receipt of the rents or by selling or pledging the land; at the same time it is also desirable that the ownership of the land, subject to the payment of the money, should remain as much as possible in the same state as before, and that when the money is paid, the persons to whom it was due should no longer have anything to do with the property. These desirable objects are accomplished by conveyancers by means of the creation of a long term of years, say 1,000, which is vested (when the parties to be paid are numerous, or other circumstances make such a course desirable), in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage thereof for the whole or any part of the term, to raise and pay the money required, as it may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits. By this means the parties to be paid have ample security for the payment of their money. Not only have their trustees the right to receive on their behalf (if they think fit) the whole accruing income of the property, but they have also power at once to dispose of it for 1,000 years to come, a power which is evidently almost as effectual as if they were enabled to sell the fee simple. Until the time of payment comes the owner of the land is entitled, on the other hand, to receive the rents and profits, by virtue of the trust under which the trustees may be compelled to permit him so to do. So,

The parties have ample security.

if part of the rents should be required, the residue must be paid over to the owner; but if non-payment by the owner should render a sale necessary, the trustees will be able to assign the property, or any part of it, to any purchaser for 1,000 years without any rent. But until these measures may be enforced, the ownership of the land, subject to the payment of the money, remains in the same state as before. The trustees, to whom the term has been granted, have only a chattel interest; the legal seisin of the freehold remains with the owner, and may be conveyed by him, or devised by his will, or will descend to his heir, in the same manner as if no term existed, the term all the while still hanging over the whole, ready to deprive the owners of all substantial enjoyment, if the money should not be paid.

The ownership of the land, subject to the payment, remains as before.

If, however, the money should be paid, or should not ultimately be required, different methods may be employed of depriving the trustees of all power over the property. The first method, and that most usually adopted in modern times, is by inserting in the deed, by which the term is created, a proviso that the term shall cease, not only at its expiration by lapse of time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary or incapable of taking effect (*e*). This proviso for *cesser*, as it is called, makes the term endure so long only as the purposes of the trust require; and, when these are satisfied, the term expires without any act to be done by the trustees; their title at once ceases, and they cannot, if they would, any longer intermeddle with the property.

Proviso for cesser.

But if a proviso for cesser of the term should not be inserted in the deed by which it is created, there is still a method of getting rid of the term, without disturbing

(*e*) See Sugd. V. & P. 621.

the ownership of the lands which the term overrides. The lands, in such cases, it should be observed, may not, and seldom do, belong to one owner for an estate in fee simple. The terms of which we are now speaking are most frequently created by marriage settlements, and are the means almost invariably used for securing the portions of the younger children: whilst the lands are settled on the eldest son in tail (*f*). But, on the son's coming of age, or on his marriage, the lands are, for the most part, as we have before seen (*g*), resettled on him for life only, with an estate tail in remainder to his unborn eldest son. The owner of the lands is therefore probably only a tenant for life, or perhaps a tenant in tail. But, whether the estate be a fee simple, or an estate tail, or for life only, each of these estates is, as we have seen, an estate of freehold (*h*), and, as such, is larger, in contemplation of law, than any term of years, however long. The consequence of this legal doctrine is, that if any of these estates should happen to be vested in any person, who at the same time is possessed of a term of years in the same land, and no other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not a bit the larger. The term will, as it is said, be *merged* in the estate of freehold (*i*). Thus, let A. and B. be tenants for a term of 1,000 years, and subject to that term let C. be tenant for his life; if now A. and B. should assign their term to C. (which assignment under such circumstances is called a *surrender*), C. will still be merely tenant for life as before. The term will be gone for ever; yet C. will have no right to make any disposition to endure beyond his own life. He had the legal seisin of the lands before, though A. and B. had the possession by virtue of their term; now, he will have both legal seisin and actual

Terms are used for securing portions.

Any estate of freehold is a larger estate than a term of years.

Merger of the term.

Surrender.

(*f*) See the form of settlement given in Part VI., *post*.
(*g*) *Ante*, p. 100.
(*h*) *Ante*, p. 63.
(*i*) 3 Prest. Conv. 219. See *ante*, pp. 331, 361.

possession during his life, and A. and B. will have completely given up all their interest in the premises. Accordingly, if A. and B. should be trustees for the purposes we have mentioned, a surrender by them of their term to the legal owner of the land, will bring back the ownership to the same state as before. By the Real Property Act, 1845 (*k*), a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.

Surrenders now to be by deed.

The merger of a term of years is sometimes occasioned by the accidental union of the term and the immediate freehold in one and the same person. Thus, if the trustee of the term should purchase the freehold, or if it should be left to him by the will of the former owner, or descend to him as heir at law, in each of these cases the term will merge. So if one of two joint holders of a term obtain the immediate freehold, his moiety of the term will merge; or conversely if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term will merge, and the joint ownership of the freehold will continue, subject only to the remaining moiety of the term (*l*). Merger, being a *legal* incident of estates, formerly occurred quite irrespectively of the trusts on which they were held; but equity did its utmost to prevent any injury being sustained by a cestui que trust, the estate of whose trustee might accidentally have merged (*m*). But the Judicature Act of 1873 (*n*)

Accidental merger.

(*k*) Stat. 8 & 9 Vict. c. 106. s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect; see *ante*, p. 156, n. (*s*).

(*l*) *Sir Ralph Borey's case*, 1 Vent. 193, 195; Co. Litt. 186 a; Burton's Compendium, pl. 900.

(*m*) See 3 Prest. Conv. 320, 321: *Chambers* v. *Kingham*, 10 Ch. D. 743.

(*n*) Stat. 36 & 37 Vict. c. 66; s. 25, sub-s. 4, which by stat. 37 & 38 Vict. c. 83, commenced on the 1st Nov., 1875: *Snow* v. *Boycott*, 1892, 3 Ch. 110; *Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson* v. *Liddard*, *ib.* 635.

provided that there should not, in future, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. The law, though it did not recognize the trusts of equity, yet took notice in some few cases of property being held by one person in right of another, or *in autre droit*, as it is called: and in these cases the general rule was, that the union of the term with the immediate freehold would not cause any merger, if such union were occasioned by the act of law, and not by the act of the party. Thus, if a term were held by a person, to whose wife the immediate freehold afterwards came by descent or devise, such freehold, coming to the husband in right of his wife, would not have caused a merger of the term (*o*). So, if the owner of a term made the freeholder his executor, the term would not have merged (*p*); for the executor is recognized by the law as usually holding only for the benefit of creditors and legatees; but if the executor himself should be the legatee of the term, it seems that, after all the creditors have been paid, the term will still merge (*q*). And if an executor, whether legatee or not, holding a term as executor, should *purchase* the immediate freehold, the better opinion is, that this being his own act, will occasion the merger of the term, except so far as respects the rights of the creditors of the testator (*r*).

Estates held *in autre droit.*

The term might have been kept on foot.

There was formerly another method of disposing of a term when the purposes for which it was created had been accomplished. If it were not destroyed by a proviso for cesser, or by a merger in the freehold, it

(*o*) *Doe* d. *Blight* v. *Pett*, 11 A. & E. 842; *Jones* v. *Davies*, 5 H. & N. 766, 7 H. & N. 507.

(*p*) Co. Litt. 338 b.

(*q*) 3 Prest. Conv. 310, 311. See *Law* v. *Urlwin*, 16 Sim. 377, and Lord St. Leonards' comments on this case, Sugd. V. & P. 507, 13th ed.

(*r*) Sugd. V. & P. 505, 13th ed.

might have been kept on foot for the benefit of the owner of the property for the time being. A term, as we have seen, is an instrument of great power, yet easily managed; and in case of the sale of the property, it might have been a great protection to the purchaser. Suppose, therefore, that, after the creation of such a term as we have spoken of, the whole property had been sold. The purchaser, in this case, often preferred having the term still kept on foot, and assigned by the trustees to a new trustee of his own choosing, in trust for himself, his heirs and assigns; or, as it was technically said, *in trust to attend the inheritance*. The reason for this proceeding was that the former owner might, possibly, since the commencement of the term, have created some incumbrance upon the property, of which the purchaser was ignorant, and against which, if existing, he was of course desirous of being protected. Suppose, for instance, that a rent-charge had been granted to be issuing out of the lands, subsequently to the creation of the term: this rent-charge of course could not affect the term itself, but was binding only on the freehold, subject to the term. The purchaser, therefore, if he took no notice of the term, bought an estate, subject not only to the term, but also to the rent-charge. Of the existence of the term, however, we suppose him to have been aware. If now he should have procured the term to be surrendered to himself, the unknown rent-charge, not being any estate in the land, would not have prevented the union and merger of the term in the freehold. The term would consequently have been destroyed, and the purchaser would have been left without any protection against the rent-charge, of the existence of which he had no knowledge, nor any means of obtaining information. The rent-charge by this means became a charge, not only on the legal seisin, but also on the possession of the lands, and was said to be accelerated

Assignment in trust to attend the inheritance.

Case of a rent-charge.

Consequence of a surrender of the term.

by the merger of the term (*s*). The preferable method, therefore, always was to avoid any merger of the term; but on the contrary, to obtain an assignment of it to a trustee in trust for the purchaser, his heirs and assigns, and to attend the inheritance. The trustee thus became possessed of the lands for the term of 1,000 years; but he was bound by virtue of the trust, to allow the purchaser to receive the rents, and exercise what acts of ownership he might please. If, however, any unknown incumbrance, such as the rent-charge in the case supposed, should have come to light, then was the time to bring the term into action. If the rent-charge should have been claimed, the trustees of the term would at once have interfered, and informed the claimant that, as his rent-charge was made subsequently to the term, he must wait for it till the term was over, which was in effect a postponement *sine die*. In this manner, a term became a valuable protection to any person on whose behalf it was kept on foot, as well as a source of serious injury to any incumbrancer, such as the grantee of the rent-charge, who might have neglected to procure an assignment of it on his own behalf, or to obtain a declaration of trust in his favour from the legal owner of the term. For it will be observed that, if the grantee of the rent-charge had obtained from the persons in whom the term was vested a declaration of trust in his behalf, they would have been bound to retain the term, and could not lawfully have assigned it to a trustee for the purchaser.

The term should have been assigned to attend the inheritance.

If the purchaser, at the time of his purchase, should have had notice of the rent-charge, and should yet have procured an assignment of the term to a trustee for his own benefit, the Court of Chancery would, on the first principles of equity, have prevented his trustee from

If the purchaser had notice of the incumbrance at the time of his purchase, he could not use the term.

(*s*) 3 Prest. Conv. 160.

making any use of the term to the detriment of the grantee of the rent-charge (*t*). Such a proceeding would evidently be a direct fraud, and not the protection of an innocent purchaser against an unknown incumbrance. To this rule, however, one exception was admitted, which reflects no great credit on the gallantry, to say the least, of those who presided in the Court of Chancery. In the common case of a sale of lands in fee simple from A. to B., it was holden that, if there existed a term in the lands, created prior to the time when A.'s seisin commenced, or prior to his marriage, an assignment of this term to a trustee for B. might be made use of for the purpose of defeating the claim of A.'s wife, after his decease, to her dower out of the premises (*u*). Here B. evidently had notice that A. was married, and he knew also that, by the law, the widow of A. would, on his decease, be entitled to dower out of the lands. Yet the Court of Chancery permitted him to procure an assignment of the term to a trustee for himself, and to tell the widow that, as her right to dower arose subsequently to the creation of the term, she must wait for her dower till the term was ended. We have already seen (*x*), that, as to all women married after the 1st of January, 1834, the right to dower has been placed at the disposal of their husbands. Such husbands, therefore, had no need to request the concurrence of their wives in a sale of their lands, or to resort to the device of assigning a term, should this concurrence not have been obtained.

An exception.

Dower barred by assignment of term.

When a term had been assigned to attend the inheritance, the owner of such inheritance was not regarded, in consequence of the trust of the term in his favour, as having any interest of a personal nature, even in

The owner of the inheritance subject to an attendant term had a real estate.

(*t*) *Willoughby* v. *Willoughby*, 1 T. R. 763, 1 R. R. 397.
(*u*) Sugd. V. & P. 510, 13th ed.; Co. Litt. 208 a. n. (1).
(*x*) *Ante*, p. 518.

contemplation of equity: but as, at law, he had a real estate of inheritance in the lands, subject to the term, so, in equity, he had, by virtue of the trust of the term in his favour, a real estate of inheritance in immediate possession and enjoyment (*y*). If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered attendant on the inheritance, by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates.

Term attendant by construction of law.

In 1845, however, an Act passed "to render the assignment of satisfied terms unnecessary" (*z*). This Act provides (*a*), that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the thirty-first day of December, 1845, be attendant upon the reversion or inheritance of any lands, shall, *on that day absolutely cease* and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, 1845, and shall, for the purpose of such protection, *be considered in every court of law and of equity to be a subsisting term*. The Act further provides (*b*) that every term of years then subsisting, or thereafter to be created, becoming satisfied after the thirty-first of December, 1845, and which, either by express declaration or by

Act to render the assignment of satisfied terms unnecessary.

(*y*) Sugd. V. & P. 790, 11th ed.
(*z*) Stat. 8 & 9 Vict. c. 112.
(*a*) Sect. 1.
(*b*) Stat. 8 & 9 Vict. c. 112, s. 2; *Anderson* v. *Pigott*, L. R. 8 Ch. 180.

construction of law, shall after that day become attendant upon the inheritance or reversion of any land, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (*c*). In the two first editions of this work, some remarks on this Act were inserted by way of Appendix. These remarks are now omitted, not because the author changed his opinion on the wording of the Act, but because the remarks, being of a controversial nature, seemed to him to be scarcely fitted to be continued in every edition of a work intended for the use of students, and also because the Act has, upon the whole, conferred a great benefit on the community. Experience has in fact shown that the cases in which purchasers enjoy their property without any molestation are infinitely more numerous than those in which they are compelled to rely on attendant terms for protection; so that the saving of expense to the generality of purchasers seems greatly to counterbalance the inconvenience to which the very small minority may be put, who have occasion to set up attendant terms as a defence against adverse proceedings. And it is very possible that some of the questions to which this Act gives rise may never be actually litigated in a Court of justice.

Enlargement of long term into fee simple.

By the Conveyancing Act of 1881 (*d*), where land is held for an unexpired residue of not less than two hundred years of a term, which was originally of not less than three hundred years, without any trust or right of redemption in favour of the freeholder or reversioner, and without any rent, or with a rent which

(*c*) It has been decided that a term of years assigned to a trustee in trust for securing a mortgage debt, and subject thereto to attend the inheritance, is not an attendant term within this Act; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 65.

is of no money value or has been released or has ceased to be payable, then the term may be enlarged into a fee simple by a declaration to that effect, made by deed by any of the following persons (namely): (1) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term (*e*); (2) any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not; (3) any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not. The fee simple so acquired is in general subject to the same trusts, executory limitations over, rights and equities as the term; and includes the fee simple of all mines and minerals not severed in right or in fact at the time of the enlargement. Such a term as aforesaid may be so enlarged, although it have not the freehold as the immediate reversion thereon: but not if liable to be determined by re-entry for condition broken, or created by sub-demise out of a term incapable of enlargement to fee simple (*f*).

(*e*) In the case of a married woman, the concurrence of her husband is required, unless she be entitled for her separate use.

(*f*) Stat. 45 & 46 Vict. c. 39, s. 11.

CHAPTER II.

OF A MORTGAGE OF LAND.

We have seen (*a*) that a mortgage forms part of the personal estate of the mortgagee. We will now consider the nature of the interests in land, which are created by a mortgage. At the present day what is generally understood by the term *mortgage* is a conveyance of land or other property as security for the payment of money. Mortgages are most frequently made to secure the repayment of money borrowed by the owner of the property mortgaged; in which case he incurs a debt, of personal obligation to repay out of whatever means he may possess (*b*): unless, indeed, it should have been agreed that he should not be under any personal liability of repayment (*c*). Such mortgages, however, usually include an express covenant for repayment. But in so far as a mortgage is a transfer of property, its object is to confer on the mortgagee a proprietary right, by exercising which he will be enabled to raise the money payable to him; so that he shall have the means of securing himself from loss in the event of his debtor being personally unable to pay, or of attaining the desired end, where there is no personal liability to payment. But though the object of a mortgage of land is nothing more than to pledge the land as security for a money payment, the form, which this transaction has usually assumed in modern English Law, is such that the interests of the parties are of a very complicated

(*a*) *Ante*, p. 485.

(*b*) Bac. Abr. Mortgage (D); *Yates* v. *Aston*, 4 Q. B. 182; *Barnes* v. *Glenton*, 1898, 2 Q. B. 223, 1899, 1 Q. B. 885.

(*c*) *Mathew* v. *Blackmore*, 1 H. & N. 762.

nature. For, as we shall see, a mortgagee of land occupies one position *at law*, and another *in equity*.

Origin of term *mortgage*.

The origin of the term *mortgage* appears in Glanville (*d*), in whose time either land or goods might be pledged as security for a debt. A pledge of land was effected by a conveyance thereof to the creditor to hold until the debt was paid, with an agreement either that the creditor should apply the rents and profits in reduction of the debt, or that he should receive them without any liability to account. In the latter case the transaction was called *mortuum vadium* (which in French is *mort gage*, whence mortgage): because, although the debtor might redeem the land on payment of the principal sum, in the meantime it was dead or unprofitable to him. The object of the *mortuum vadium* was to give the creditor the profits of the land in lieu of interest: the taking of which, under the name of usury, was anciently regarded as an unchristian abomination (*e*). But these ancient methods of pledging land seem to have fallen out of use at an early date, and to have been succeeded by a more stringent contract, under which the land was given in pledge until a certain day fixed for payment, with a stipulation that on failure to pay at the appointed time the land should remain to the creditor in fee (*f*). Then it came to be the practice to enfeoff

(*d*) Glanv. lib. x. c. 6—8.

(*e*) See Plowden on Usury, Part I. Interest was first allowed by law by stat. 37 Hen. VIII. c. 9, by which also interest above ten per cent. was forbidden. By stat. 13 Anne, c. 15 (12 Anne, st. 2, c. 16, in Ruffhead), the legal rate of interest was reduced to five per cent., which remained the highest rate of interest that could be lawfully taken upon the mortgage of any lands, tenements or hereditaments, or any estate or interest therein, until all the laws against usury were repealed in 1854. Any rate of interest to which the parties may agree may now be taken on a mortgage of lands. See stats. 5 & 6 Will. IV. c. 41: 2 & 3 Vict. c. 37: 13 & 14 Vict. c. 56: 17 & 18 Vict. c. 90: *Mainland* v. *Upjohn*, 41 Ch. D. 126.

(*f*) See Glanv. x. 6, 7; Bract. 268 b; Co. Litt. 216—218; Madox, Form. Angl. Nos. 560—562, 569, 579, 589; P. & M. Hist. Eng. Law, ii. 25, 117 *sq.*

the creditor in fee in the first instance, with a proviso for re-entry on payment. Thus Littleton (*g*) describes a mortgage as a feoffment *upon condition* that if the feoffor paid to the feoffee on a certain day a certain sum of money then the feoffor may re-enter. And he says that this is called a mortgage because, if the feoffor do not pay, then the land pledged is taken from him for ever and so dead to him. We have seen however that the term *mort gage* had been used earlier in a different sense. Still Littleton's derivation may help the reader to remember the nature of the transaction now called a mortgage *at law*. For what is now called a mortgage of land is a conveyance thereof from one to another for an estate in fee, or other estate, which is to be determined or re-conveyed on condition of the payment of money by the former on a certain day. And *at law*, if the condition be broken by non-payment of the money at the appointed time, the estate of the person, to whom the land was so conveyed, becomes absolute, or discharged from the condition. So that, at law, he will be entitled to hold the land, as his own, for all the estate limited to him. For in the Courts of Law the parties were held to the terms of their bargain, by which the land was to be redeemed on a certain day, or if not, to be forfeited by the debtor (*h*).

Construction of a mortgage at law.

This strict construction of a mortgage appears to have prevailed for a long time. But at length a mortgagor, who had failed to pay on the appointed day, obtained relief in the Court of Chancery against the forfeiture, which he had so incurred. It is not very clear when (*i*)

Relief given to mortgagors in equity.

(*g*) Sects. 332 *sq.*

(*h*) Bac. Abr. Mortgage (D); Y. B. 22 Hen. VI. 57, pl. 7; 7 Edw. IV. 3, 4. pl. 7, 10; Bro. Abr. Condicions, 203; Litt. ss. 332, 337.

(*i*) Suits for redeeming mortgages appear to have been brought in Queen Elizabeth's reign; 1 Cal. cxlv. 69. 71. 77. 79. 105, 111, 125, &c.: 2 Cal. 5, 14, 15, 27, 33, 35, &c.: and see *Langford* v. *Barnard* (37 Eliz.) and *Barnaby* v. *Greene* (9 Jac. I.) in Tothill. tit. Mortgage. See also Selden Socy. vol. x., p. 137, pl. 141, a

or on what ground (*k*) this equitable jurisdiction was first exercised. But in the reign of Charles I. it was established *as equity* (*l*) that a mortgagor should be allowed to redeem his estate after the legal day of payment had gone by; and the Court of Chancery, on application by the mortgagor after the time fixed for redemption had elapsed, would decree that the mortgagee should, on repayment of all that was due to him, reconvey the estate to the mortgagor (*m*).

Principles of equity respecting mortgages.

The main principles of equity in respect of the redemption of mortgages were settled in the reign of Charles II.; about the time when modern equity began to take shape as a system of rules resting upon principles evolved from precedent (*n*). The first principle established was that of the mortgagor's

Equity of redemption.

equity of redemption: that is, that the mortgagor, or any one standing in his place, shall be admitted in equity to redeem a mortgage after the day fixed by the contract for redemption is gone by, and the estate has become forfeited at law (*o*). It was further laid down as a general rule, subject to very few exceptions, that wherever a conveyance of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument or even by parol evidence (*p*), it is always considered in equity as a mortgage and redeemable; even though there is an express agreement of the

suit in the reign of Hen. VI. to redeem, on the ground of fraud, a mortgage before it had become absolute at law.

(*k*) It would appear from what is said by Sir G. Cary (Master in Chancery, 1599—1612) that relief was first given in cases of failure to pay at the appointed time by *accident*, or of some trifling default, and was afterwards extended to all cases of forfeiture of mortgaged land by failure to pay money when due: see Cary 1.

(*l*) *Ante*, p. 158.

(*m*) *How* v. *Vigures*, 1 Ch. Rep. 18; *Weldon* v. *Rallison*, *ib.* 91.

(*n*) *Ante*, p. 163.

(*o*) See *Turn* v. *Turner*, 39 Ch. D. 456.

(*p*) Prec. Ch. 526; *England* v. *Codrington*, 1 Eden. 169; *Vernon* v. *Bethell*, 2 Eden. 110; 1 Coote on Mortgage, ch. iii. sect. 3.

parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons (*q*). In other words, it was established that no agreement of the parties to a mortgage, that the mortgage should not be redeemable according to the rules of equity, should have any effect in equity (*r*). This principle is shortly summed up in the phrase "once a mortgage, always a mortgage" (*s*). Furthermore, it was held that, in equity, the right of the mortgagee was to the money secured, and he held the land only as security for his money; so that in equity he had a mere *charge* for the amount due to him, even though he were absolute tenant in fee at law. It was therefore decided that the benefit of a mortgage should go, along with the rest of the mortgagee's personal estate, to his executor or administrator, not his heir (*t*). And although at law the estate of a mortgagee in fee would go to his heir or devisee, yet in equity the heir or devisee was held a mere trustee thereof for the executor or administrator (*u*). Consequently, in equity the mortgagor was regarded as the owner of the mortgaged land, subject only to the mortgagee's charge: and the mortgagor's equity of redemption was treated as an equitable estate in the land, of the same nature as other equitable estates (*x*).

(*q*) Co. Litt. 205 a, note (1); 1 Coote on Mortgage, ch. iii. sect. 2.

(*r*) *Price* v. *Perrie*, 2 Freem. 258; *Salt* v. *Marquis of Northampton*, 1892. A. C. 1. Upon this principle it was held that any attempt to fetter the equity of redemption with any other condition than the payment of principal, interest and costs should be void: *Jennings* v. *Ward*, 2 Vern. 520; *James* v. *Kerr*, 40 Ch. D. 449, 459; *Field* v. *Hopkins*, 44 Ch. D. 524; *Re Wallis, Ex parte Lickorish*, 25 Q. B. D. 176; *Rice* v. *Noakes*, 1900, 2 Ch. 445; cf. *Biggs* v. *Haddinott*, 1898, 2 Ch. 307; *Santley* v. *Wilde*, 1899, 1 Ch. 747. By stat. 58 & 59 Vict. c. 25, solicitor mortgagees are allowed to charge profit costs.

(*s*) Lord Nottingham, C., *Newcourt* v. *Bonham*, 1 Vern. 7; *Howard* v. *Harris*, *ib.* 33.

(*t*) *Thornborough* v. *Baker*, 1 Ch. Ca. 283; 3 Swanst. 628.

(*u*) 2 Coote on Mortgage, ch. lxxix. sect. 1.

(*x*) *Casborne* v. *Scarfe*, 1 Atk. 603, 605.

Form of mortgage now usual.

These principles of equity became so well settled and understood that no substantial change was made in the usual form of a mortgage. And at the present day, when the repayment of a loan of money is to be secured by a mortgage of land, the land is granted to the creditor in fee simple, with a proviso for reconveyance of the land to the debtor in fee on payment of the principal sum with interest at a specified rate on a certain day, usually six months after the date of the mortgage-deed. By the same deed the mortgagor generally enters into a personal covenant to pay principal and interest on the day appointed for reconveyance, and also to continue to pay interest at the same rate in case of failure to redeem at the appointed time. Until the six months are passed the mortgagor has a *legal* right to redeem the land on the day named for repayment. But if he should allow that day to pass without payment or tender of the amount due, the mortgagee's estate will become absolute at law, and the mortgagor will have no right to the land save his equity of redemption. Mortgages, as is well known, are generally employed as permanent investments of money; and there is rarely any intention on either side that the loan should be repaid in six months. Nevertheless, so well understood is the construction placed on a mortgage in equity, so firmly established is the mortgagor's right to redeem after the time fixed for payment is gone by, that mortgage deeds are always drawn in the form indicated. All that is expressed is an immediate conveyance of the land to the mortgagee and the agreement for reconveyance on payment six months after; and the real intention of the parties is left to be carried out by the operation of the rules of equity (*y*).

The estate of the mortgagee.

Let us now consider the interests of the mortgagee and mortgagor in the mortgaged land during the

(*y*) See the form of mortgage given in Part VI., *post*. The following duties are imposed by the Stamp Act, 1891, stat. 54 & 55

continuance of the security. On execution of such a mortgage deed as has been described, the mortgagee acquires the fee simple and seisin of the land at law (z), and an immediate right of entry into actual

Vict. c. 39, replacing 33 & 34 Vict. c. 97, as amended by 51 Vict. c. 8, s. 15 and schedule:—

Mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment:

	£	s.	d.
(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money not exceeding 10*l.*	0	0	3
Exceeding 10*l.* and not exceeding 25*l.* ...	0	0	8
„ 25*l.* „ „ 50*l.* ...	0	1	3
„ 50*l.* „ „ 100*l.* ...	0	2	6
„ 100*l.* „ „ 150*l.* ...	0	3	9
„ 150*l.* „ „ 200*l.* ...	0	5	0
„ 200*l.* „ „ 250*l.* ...	0	6	3
„ 250*l.* „ „ 300*l.* ...	0	7	6
„ 300*l.*			
For every 100*l.* and also for any fractional part of 100*l.* of such amount	0	2	6
(2) Being a collateral or auxiliary or additional or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:			
For every 100*l.* and also for any fractional part of 100*l.* of the amount secured ...	0	0	6
(3) Being an equitable mortgage:			
For every 100*l.* and any fractional part of 100*l.* of the amount secured...	0	1	0
(4) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:			
For every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned or disposed, exclusive of interest which is not in arrear	0	0	6
And also where any further money is added to the money already secured	The same duty as a principal security for such further money.		
(5) Reconveyance, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured:			
For every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured	0	0	6

(z) *Ante*, pp. 200, 201.

possession (*a*). A mortgagor remaining in possession is at law in no better position than a tenant by sufferance (*b*). The mortgagee may therefore oust him at his pleasure, either by entry, or if he will not go out peaceably, by action. And if the mortgagee chooses so to assert his legal rights, the mortgagor will have no right to resist him either at law (*c*) or in equity (*d*) without paying the amount due on the mortgage (*e*). For the Courts of Equity would never interfere to prevent a mortgagee from taking possession (*f*). But if he do take possession, he will become liable in equity to account very strictly, in case of subsequent redemption, for the rents and profits and for his management of the land (*g*); so strictly, indeed, that in practice a mortgagee avoids taking possession of the mortgaged land, save as a last resource. As we have seen (*h*), at law the estate of a mortgagee in fee passed on his death to his heir or devisee: though in equity the heir or devisee was a mere trustee for the mortgagee's executor or administrator, who became entitled to the money secured. But by the Conveyancing Act of 1881 (*i*), on the death after that year of a sole mortgagee of any freehold estate of inheritance, his estate, notwithstanding

(*a*) *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553; *Rogers* v. *Grazebrook*, 2 Q. B. 895. If, however, the mortgage deed contain an express proviso (formerly common, but now unusual) that the mortgagor shall remain in possession until the day fixed for payment, this will operate as a demise by the mortgagee to the mortgagor for the term indicated, and the latter will have a legal right to possession until the term has expired: see Davidson, Prec. Conv. Vol. II. Part. II. pp. 43—45, 4th ed.; notes to *Keech* v. *Hall*, 1 Smith L. C.

(*b*) Notes to *Keech* v. *Hall*, 1 Smith L. C.; *ante*, p. 487.

(*c*) *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767.

(*d*) 6 Q. B. D. 359.

(*e*) By stat. 7 Geo. II. c. 20, s. 1, provision was made for staying the proceedings in any action of ejectment brought by a mortgagee, on payment by the mortgagor, being the defendant in the action, of all principal, interest, and costs; *Doe* d. *Hurst* v. *Clifton*, 4 A. & E. 814. See also stat. 15 & 16 Vict. c. 76, ss. 219, 220, repealed (saving the jurisdiction thereby conferred) by 46 & 47 Vict. c. 49.

(*f*) 2 Mer. 359; 6 Pri. 503.

(*g*) 2 Seton on Decrees, 1634, 5th ed.

(*h*) *Ante*, p. 531.

(*i*) Stat. 44 & 45 Vict. c. 41 s. 30; *ante*, pp. 236, 255.

any testamentary disposition, devolves like a chattel real upon his personal representatives. So that all the rights and obligations, legal as well as equitable, of a sole mortgagee of freeholds now pass on his death to his executor or administrator.

The estate of the mortgagor.

We have seen that, during the continuance of the security, the mortgagor's equity of redemption is in equity an estate in the mortgaged land (*k*). A mortgagor's estate has generally the same incidents as any other equitable estate; but, being subject to the mortgagee's charge, it is of course not so beneficial as the estate of one for whom land is held on a simple trust (*l*). Thus we have seen that a mortgagor's possession is not protected, even in equity, against the will of the mortgagee (*m*). But if the mortgagor be allowed to remain in possession, he may take the profits for his own use without liability to account for them to the mortgagee (*n*). So he retains generally the right of free enjoyment incident to his equitable ownership (*o*); nor will he be restrained from waste (*p*), at the mortgagee's instance, unless the latter show that the acts contemplated would impair the value of the security offered to him (*q*), or amount to wanton destruction (*r*). An equity of redemption is alienable at the mortgagor's pleasure or for his debts, in the same way as any other equitable estate which is not a simple trust estate (*s*). And the estate of a mortgagor in fee is real estate in equity, would pass as such to a devisee under his will (*t*), or descend to his heir, if he should have died intestate, and now devolves

(*k*) *Ante*, p. 531.
(*l*) *Ante*, p. 178.
(*m*) *Ante*, p. 534.
(*n*) 2 Coote on Mortgage, ch. lxi. sect. 2; 2 Seton on Decrees, 1629, 1633, 5th ed.: *Gaskell* v. *Gosling*, 1896, 1 Q. B. 691.
(*o*) *Ante*, p. 184.
(*p*) *Ante*, p. 114.
(*q*) *King* v. *Smith*, 2 Hare, 239, 244.
(*r*) *Goodman* v. *Kine*, 8 Beav. 379.
(*s*) *Ante*, pp. 185—187, 284—286; Lewin on Trusts, 647, 650 *sq.*, 675 *sq.*, 6th ed.; 978, 981 *sq.*, 1010 *sq.*, 10th ed.
(*t*) 3 Atk. 805.

to the executors or administrator on trust, subject to the mortgagor's debts, for his devisee or heir (*u*). Formerly, on the death of a mortgagor of land, the mortgage debt was primarily payable, like all other debts, out of his personal estate (*x*); so that his heir or devisee was entitled, as a rule, to have the land exonerated from the mortgage at the expense of the mortgagor's general personal estate (*y*). But this rule was reversed by an Act of 1854, commonly called Locke King's Act, and the Acts amending it (*z*). And now, under these Acts, a mortgagor's heir or devisee succeeding to his estate in the mortgaged land is not entitled to have the mortgage debt discharged out of the mortgagor's personal or other real estate; but the land so charged, as between the different persons claiming under the deceased person, is primarily liable to the payment of all mortgage debts with which the same is charged, unless the mortgagor shall by will, deed, or other document have signified a contrary or other intention (*a*). So that now, as a rule, a mortgagor's heir or devisee must take the land subject to the mortgage (*b*). The rule established by these

(*u*) *Ante*, pp. 29, 57, 74, 84, 85, 108, 131, 137, 183, 187, 202, 214, 218—221, 241, 282, 286, 311, 344, 372, 423, 427, 433, 437, 463, 464, 478.

(*x*) *Ante*, pp. 20, 275.

(*y*) 2 Jarm. Wills, 1439 *sq.*, 5th ed.; Williams on Real Assets, 27.

(*z*) Stats. 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

(*a*) Stat. 17 & 18 Vict. c. 113. And a general direction, that the debts or all the debts of a testator shall be paid out of his personal estate, is not to be deemed to be a declaration of an intention contrary to or other than the rule established by Locke King's Act, unless such contrary or other intention be further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate: stat. 30 & 31 Vict. c. 69, s. 1. Nor is such contrary intention to be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal or residuary real estate; stat. 40 & 41 Vict. c. 34; see *Re Fleck*, 37 Ch. D. 677.

(*b*) By stat. 40 & 41 Vict. c. 34, the rule of Locke King's Act is extended to the case of a mortgage or any other equitable charge (including any lien for unpaid purchase-money) on any land or other hereditaments, of whatever tenure, belonging to a testator or an intestate; unless, in the case of a *testator*, he shall within the meaning of the Acts have signified a contrary inten-

Acts does not affect the right of the mortgagee to obtain full payment of the mortgage debt out of the personal estate of the mortgagor or otherwise (*c*).

Mortgagor's power of leasing.

As the mortgagor's equity of redemption is an *estate* in the contemplation of equity only, it does not enable him to create any *legal* estate or interest in the mortgaged land; not even a lease for any term however short (*d*). In some cases, however, there was inserted in the mortgage deed, by agreement between the parties, a power for the mortgagor to grant leases: and such a power operated under the Statute of Uses in the same manner as a power of leasing given to a tenant for life by a settlement (*e*). But under the Conveyancing Act of 1881, if the mortgage be made after the year 1881, the mortgagor while in possession has power by virtue of that Act to make an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease for any term not exceeding ninety-nine years upon the conditions defined in the Act (*f*). And any such lease made in compliance with these conditions will be valid as against the mortgagee (*g*). When a mortgagor exercises this statutory power of leasing, the lessee obtains a term in the land valid at law in the

tion. See *Re Cockcroft*, 24 Ch. D. 94, 100; *Re Kershaw*, 37 Ch. D. 674; *Re Anthony*, 1891, 1 Ch. 450.

(*c*) Stat. 17 & 18 Vict. c. 113.

(*d*) *Doe* d. *Lord Downe* v. *Thompson*, 9 Q. B. 1037; *Lows* v. *Telford*, 1 App. Cas. 414. A lease made by a mortgagor, otherwise than under an express or a statutory power, is void as against the mortgagee: and as against the mortgagor himself, his successors in estate and the lessee, it can only take effect legally by estoppel. See *ante*, p. 494; *Keech* v. *Hall*, 1 Doug. 21; 1 Smith L. C. 504, 10th ed.; *Melhorne* v. *Gomme*, 2 Bing. 54; *Webb* v. *Austin*, 7 Man. & Gr. 701; *Cuthbertson* v. *Irving*, 6 H. & N. 135. But a lessee from the mortgagor may redeem the mortgage, and so prevent his ejectment by the mortgagee: *Turn* v. *Turner*, 39 Ch. D. 456. See stat. 53 & 54 Vict. c. 57 as to compensation to persons occupying agricultural holdings under a contract of tenancy with a mortgagor.

(*e*) *Ante*, p. 382; Davidson, Prec. Conv. Vol. II. Pt. II. 332, 335, n., 4th ed.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 18.

(*g*) *Municipal, &c., Building Society* v. *Smith*, 22 Q. B. D. 70; *Brown* v. *Peto*, 1900, 2 Q. B. 653.

same manner as the lessee of an equitable tenant for life obtains a legal term on an exercise of the power of leasing given by the Settled Land Act, 1882 (*h*). But this statutory right of the mortgagor may be excluded or restricted by agreement between the parties expressed in the mortgage deed or otherwise in writing (*i*); and in practice a stipulation is very often made that a mortgagor shall not exercise his statutory power of leasing, or that he shall not exercise it without the consent of the mortgagee. It is important for a mortgagee clearly to negative the mortgagor's right to lease, should he wish to do so; for a contract to make or accept a lease under the statute may be enforced by or against every person on whom the lease would, if granted, be binding (*k*). And the provisions of the Act are to be construed to apply, as far as circumstances admit, to any letting, and to any agreement, whether in writing or not, for leasing or letting (*l*). But, if desired, express powers of leasing may still be given by the mortgage deed as before; and, what is more, the mortgagor's statutory powers of leasing may be enlarged by the mortgage deed to any extent agreed on (*m*). A mortgagor's statutory powers of leasing may be applied to mortgages made before the year 1882, by agreement in writing between mortgagor and mortgagee made after 1881: but so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement (*n*).

Actions by mortgagor.

A further consequence of the transfer of the legal estate to the mortgagee upon the occasion of a mortgage was that the mortgagor was unable to bring in his own name any action at law to recover possession of the

(*h*) *Ante*, p. 393.
(*i*) Stat. 44 & 45 Vict. c. 41, s. 18, sub-s. 13.
(*k*) Sect. 18, sub-s. 12.
(*l*) Sect. 18, sub-s. 17.
(*m*) Sect. 18, sub-s. 14.
(*n*) Sect. 18, sub-s. 16.

land (*o*). But by the Judicature Act of 1873 (*p*), a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person. But this does not enable a mortgagor to enforce by action a right of entry for breach of covenant under a proviso contained in a lease made before the mortgage (*q*).

Mortgagee's remedies.

Let us now consider what remedies the mortgagee has for obtaining the repayment of his loan. And first, at any time after the day fixed for repayment in the deed, he may call in his money, and in the event of non-payment may sue the mortgagor personally on the covenant contained in the mortgage deed. Secondly, he may *foreclose* the mortgage. For although the Courts of Equity allowed the mortgagor an equity of redemption after the day fixed for payment, they would not permit him to continue to hold the mortgaged land for an indefinite time after the mortgagee had applied to them to enforce repayment (*r*). To obtain foreclosure it will be necessary for the mortgagee to take proceedings (*s*) against the mortgagor in the Chancery Division of the High Court (*t*), claiming that an account may be

Foreclosure.

(*o*) *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065.

(*p*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 5.

(*q*) *Matthews* v. *Usher*, 1900, 2 Q. B. 535.

(*r*) 2 Coote on Mortgage, Ch. lxxviii.

(*s*) Formerly by suit, now by action or originating summons: R. S. C. Dec. 1885, No. 21 (Order LV. r. 5 a); W. N. 2 Jan. 1886.

(*t*) The County Courts have the jurisdiction of the High Court as to the foreclosure or redemption or enforcement of

taken of the principal and interest due to him, and that the mortgagor may be directed to pay the same, with costs, by a day to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption (*u*). A day is then fixed by the Court for payment; which day, however, may, on the application of the mortgagor, good reason being shown (*x*), be postponed for a time. Or, if the mortgagor should be ready to make repayment, before the cause is brought to a hearing, he may do so at any time previously, on making proper application to the Court, admitting the title of the mortgagee to the money and interest (*y*). If, however, on the day ultimately fixed by the Court, the money should not be forthcoming, an order will be made that the debtor do thenceforth stand absolutely foreclosed from all equity of redemption in the mortgaged premises (*z*). Such an order is considered to vest in the mortgagee for the first time the full beneficial title to the mortgaged land (*a*): which he will thereafter be entitled to keep and deal with as his own. The Court may now order a sale of the mortgaged property in foreclosure proceedings, instead of foreclosure (*b*). Thirdly, the mortgagee may take possession, as we have seen (*c*); though at the risk of incurring the equitable liabilities of a mortgagee in possession. A mortgagee may pursue all these remedies at once (*d*).

any mortgage, charge or lien for not more than 500*l.*; stat. 51 & 52 Vict. c. 43, s. 67.

(*u*) 2 Seton on Decrees, 1575. 5th ed.; *Hill* v. *Rowlands*, 1897, 2 Ch. 361.

(*x*) *Nunny* v. *Edwards*, 4 Russ. 124; *Eyre* v. *Hanson*, 2 Beav. 478.

(*y*) Stat. 7 Geo. II. c. 20, s. 2.

(*z*) 2 Seton on Decrees, 1651. 5th ed. But even a final order for foreclosure is not absolutely conclusive, and there are circumstances under which a mortgagor may be allowed to redeem after such an order: see *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*a*) *Heath* v. *Pugh*, 6 Q. B. D. 345, 7 App. Cas. 235. By stat. 61 & 62 Vict. c. 10, s. 6, an order for foreclosure must be stamped with an *ad valorem* stamp as a conveyance on sale: see *post*, Part VI.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 25; see Wms. Conv. Stat. 162 *sq.*

(*c*) *Ante*, p. 534.

(*d*) 2 Coote on Mortgage, Ch. lxiii. sect. 3; *Lockhart* v. *Hardy*, 9 Beav. 349; *Farrer* v. *Lacy*,

Fourthly, a mortgagee may sell under his power of sale, if he have one. For in addition to the remedy by foreclosure, which, it will be perceived, involves the necessity of an application to the Court, it has long been usual to provide a more simple and less expensive remedy in mortgage transactions: this is nothing more than a power given by the mortgage deed to the mortgagee, without further authority to sell the premises, in case default should be made in payment. When such a power is exercised, the mortgagee, having the whole estate in fee simple at law, is of course able to convey the same estate to the purchaser; and, as this remedy would be ineffectual, if the concurrence of the mortgagor were necessary, it was decided that his concurrence cannot be required by the purchaser (*e*). The mortgagee, therefore, is at any time able to sell; but, having sold, he has no further right to the money produced by the sale than he had to the lands before they were sold. He is at liberty to retain to himself his principal, interest and costs; and, having done this, the surplus, if any, must be paid over to the mortgagor. By the Act commonly called "Lord Cranworth's Act" (*f*), a power of sale was rendered incident to every mortgage or charge made by deed executed after the passing of the Act on any hereditaments of any tenure, unless a contrary intention were declared by the deed. But it was nevertheless usual to insert an express power of sale in mortgage deeds until this provision of Lord Cranworth's Act was repealed by the Conveyancing Act, 1881 (*g*). By the latter Act (*h*), a mortgagee of any property, under a mortgage made *by deed* after the year 1881, has a power of sale, when the mortgage money has become

Power of sale.

The mortgagor's concurrence cannot be required.

Statutory powers of sale.

Hartland & Co., 31 Ch. D. 42; *Poulett* v. *Hill*, 1893, 1 Ch. 277.

(*e*) *Corder* v. *Morgan*, 18 Ves. 344; *Clay* v. *Sharpe*, Sugd. Vend. & Pur. Appendix, No. XIII. p. 1096, 11th ed.

(*f*) Stat. 23 & 24 Vict. c. 145 (passed 28th Aug. 1860), part 2; see also sects. 32, 34. See Wms. Conv. Stat. 137—140.

(*g*) Stat. 44 & 45 Vict. c. 11, s. 71; see Wms. Conv. Stat. 137—141, 251—253.

(*h*) Sect. 19.

due, to the same extent as if the power had been expressly conferred by the mortgage deed. But a mortgagee shall not exercise this statutory power of sale unless and until (i) notice requiring payment of the mortgage-money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service; or (ii) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (iii) there has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon (*i*). Power is expressly given by the Act to a mortgagee exercising his statutory power of sale to convey the property sold by deed for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority (*k*). The proper application of the purchase money by the mortgagee is also provided for (*l*). Where a conveyance is made in *professed* exercise of the power of sale conferred by the Act, the title of the purchaser is not to be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power is to have his remedy in damages against the person exercising the power (*m*). All these

(*i*) Stat. 44 & 45 Vict. c. 41. ss. 20, 24; see Wms. Conv. Stat. 144, 145, 160.

(*k*) Sect. 21, sub-sect. 1; see Wms. Conv. Stat. 145—147. This does not enable an equitable mortgagee by deed to convey the legal estate; *Re Hodson and Howe's Contract*, 35 Ch. D. 668.

(*l*) Sect. 21, sub-sect. 3; see Wms. Conv. Stat. 149.

(*m*) Sect. 21, sub-sect. 2; see Wms. Conv. Stat. 147—149; *Bailey* v. *Barnes*, 1894, 1 Ch. 25; *Life Interest, &c., Corpn.* v. *Hand*

statutory provisions respecting a mortgagee's power of sale may be varied or extended or entirely excluded by the terms of the mortgage deed (*n*). But it is now usual in practice to rely upon the statutory power of sale instead of inserting express powers for the same purpose in mortgage deeds (*o*).

Mortgagee's power to appoint receiver, cut timber, and grant leases.

The same Conveyancing Act contains provisions enabling a mortgagee under a mortgage made by deed after 1881, in the absence of stipulation to the contrary, to appoint a receiver of the income of mortgaged property, but not before his statutory power of sale shall become exercisable (*p*); also to insure against fire, under certain conditions, and to cut and sell timber, while in possession (*q*). A mortgagee in possession under a mortgage made after 1881 is also empowered by the same Act, in the absence of stipulation to the contrary, to grant the same leases as a mortgagor in possession is thereby empowered to grant; and leases so granted will be good against all prior incumbrancers and the mortgagor (*r*). But, except under the statutory or an express power of leasing, a mortgagee of land is unable, before foreclosure, to make a lease, which will be unconditionally binding on the mortgagor (*s*).

Mortgagor's remedies.

If the mortgagor wish to pay off the mortgage after the day fixed for payment is past, he must, as a rule,

in Hand, &c., Soc., 1898, 2 Ch. 230.

(*n*) Sect. 19, sub-sects. 2, 3.

(*o*) As to the question of the expediency of relying on statutory powers, see Wms. Conv. Stat. 141—144, 252, 253.

(*p*) Stat. 44 & 45 Vict. c. 41, ss. 19, 24. The object of the appointment of a receiver is to ensure payment of the interest out of the income of the mortgaged property without taking possession. The receiver is bound to apply the income (after keeping down outgoings) in payment of the interest, but to pay the surplus to the mortgagor. See *Gaskell* v. *Gosling*, 1896, 1 Q. B. 691—693, 697; *Woolston* v. *Ross*, 1900, 1 Ch. 788.

(*q*) Sects. 19, 23; see Wms. Conv. Stat. 137, 139—141, 153—160.

(*r*) Sect. 18, sub-s. 2; *ante*, p. 537.

(*s*) *Hungerford* v. *Clay*, 9 Mod. 1; *Franklinski* v. *Ball*, 33 Beav.

give to the mortgagee six calendar months' previous notice in writing of his intention to do so, and must punctually pay or tender the money at the expiration of the notice (*t*). For if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice: as it is considered reasonable that he should have time afforded him to look out for another investment. A mortgagor is, however, entitled, if he think fit, to pay the mortgagee six months' interest in advance, in lieu of notice (*u*). When the mortgagor has duly paid or tendered the money due from him, either after proper notice or with due interest in advance instead, he will be entitled to require the mortgagee to execute at his expense a reconveyance of the legal estate in the mortgaged land (*x*). And to enforce this right, or otherwise duly to enforce his equity of redemption, he may take proceedings (*y*) for redemption in the Chancery Division (*z*) against the mortgagee (*a*). An order for sale may now be made in redemption as well as in foreclosure proceedings (*b*).

Reconveyance.

560, 563; Davidson, Prec. Conv. Vol. II. Pt. II. 335, 337, 4th ed.

(*t*) *Shrapnell* v. *Blake*, 2 Eq. Ca. Abr. 633, pl. 34; *Smith* v. *Smith*, 1891, 3 Ch. 550; see *Borill* v. *Endle*, 1896, 1 Ch. 648. But this rule does not apply where the just inference from the transaction is that the mortgage is merely temporary, as in the case of a mortgage to bankers by deposit of title deeds; *Fitzgerald's Trustees* v. *Mellersh*, 1892, 1 Ch. 385.

(*u*) *Johnson* v. *Evans*, W. N. 1889, p. 95, 61 L. T. 18.

(*x*) See *ante*, p. 533, n., as to the stamp on a reconveyance. Reconveyance may be effected by a vesting order in certain cases; see stat. 56 & 57 Vict. c. 53, s. 29. Mortgages made under the Building Society Acts and the Friendly Society Acts may be discharged without reconveyance, by a receipt endorsed on the mortgage deed: see L. R. Digest.

(*y*) Formerly by suit, now by action or originating summons: R. S. C. Dec. 1885, No. 21 (Order LV. r. 5 a); W. N. 2 Jan. 1886.

(*z*) Or in the County Court, if the amount be not more than 500*l.*; see *ante*, p. 539, n. (*t*).

(*a*) 2 Seton on Decrees, 1593, 5th ed.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 25; see Wms. Conv. Stat. 162 *sq.* In redemption as well as in foreclosure proceedings a mortgagee is entitled to be paid his costs and expenses; and will not be disallowed his costs without positive misconduct on his part: see 2 Seton on Decrees, 1613, 5th ed.; *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582.

A mortgagor may, however, lose his equity of redemption by lapse of time. For under the present Statute of Limitations (*c*), whenever a mortgagee has obtained possession of the land comprised in his mortgage, the mortgagor cannot bring an action to redeem the mortgage but within twelve (*d*) years next after the time when the mortgagee obtained possession, or next after any written acknowledgment of the title of the mortgagor, or of his right to redemption, shall have been given to him or his agent, signed by the mortgagee (*e*). And when the period limited by the Act is determined, the mortgagor's title to the land is extinguished (*f*). So that when a mortgagee has been in possession for twelve years without giving the required acknowledgment, he becomes absolutely entitled to the land. The time so limited for the mortgagor to redeem is not extended in the case of his being under any disability, such as lunacy (*g*). In the same way a mortgagee's rights may be barred by lapse of time, if he allow the mortgagor to remain in possession without paying principal or interest and without acknowledgment of his title; in which case he will be barred from taking possession twelve years after his right of entry accrued (*h*), and will be barred from taking foreclosure proceedings or suing for the money secured by a mortgage of land twelve years after his right of action accrued. But if the mortgagee obtain from the mortgagor any payment of principal or interest, or any written and signed acknowledgment of his title or right, he will not be barred from any of his

Lapse of time may bar right to redeem.

Mortgagee's rights barred by lapse of time.

(*c*) Stat. 37 & 38 Vict. c. 57, s. 7.

(*d*) Formerly twenty: by stat. 3 & 4 Will. IV. c. 27, s. 28, and the previous rule of equity: 2 Coote on Mortgage, ch. lxxiv. sect. 1.

(*e*) See *Hyde* v. *Dallaway*, 2 Hare, 528; *Truelock* v. *Robey*, 12 Sim. 102; *Lucas* v. *Dennison*, 13 Sim. 584; *Stansfield* v. *Hobson*, 16 Beav. 236.

(*f*) Stats. 3 & 4 Will. IV. c. 27, s. 34; 37 & 38 Vict. c. 57, s. 9.

(*g*) *Kinsman* v. *Rouse*, 17 Ch. D. 104; *Forster* v. *Patterson*, *ib.* 132. This is different from the rule of equity in force before 1833; see 2 Coote on Mortgage, ch. lxxiv. sect. 1.

(*h*) *Ante*, p. 533.

remedies until twelve years after the last of such payments or acknowledgments (*i*). And if the mortgagee, being out of possession, take foreclosure proceedings within due time, he will not be barred from taking or suing for possession, till twelve years from the date of the order for final foreclosure, which first gave him the full beneficial title to the land (*k*). The mortgagee's title to the land is extinguished when his remedies are barred (*l*).

Mortgages for long terms of years.

Mortgages of freehold lands are sometimes made for long terms, such as 1,000 years. But this is not now often the case, as the fee simple is more valuable and therefore preferred as a security. Mortgages for long terms, when they occur, are usually made by trustees, in whom the terms have been vested in trust to raise, by mortgage, money for the portions of the younger children of a family, or other similar purposes. The reasons for vesting such terms in trustees for these purposes were explained in the last chapter (*m*).

Mortgage of copyholds.

Copyhold, as well as freehold, lands may be the subject of mortgage. The purchase of copyholds, it will be remembered, is effected by a surrender of the lands from the vendor into the hands of the lord of the manor, to the use of the purchaser, followed by the admittance of the latter as tenant to the lord (*n*). The mortgage of

(*i*) Stats. 3 & 4 Will. IV. c. 27, ss. 2. 14; 1 Vict. c. 28; 37 & 38 Vict. c. 57, ss. 8, 9; *Wrixon* v. *Vize*, 3 Dru. & War. 104, 119; *Harlock* v. *Ashberry*, 19 Ch. D. 539; *Hugill* v. *Wilkinson*, 38 Ch. D. 480. But if the mortgagee, or the person standing in his place, should be under any of the disabilities mentioned in the Statute of Limitations when the right to sue for foreclosure or possession first accrued, it appears that proceedings may be taken within the further time now allowed in case of disability; see stats. 3 & 4 Will. IV. c. 27, ss. 16—18; 37 & 38 Vict. c. 57, ss. 3—5; and see next chapter.

(*k*) *Heath* v. *Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235; *ante*, p. 540.

(*l*) Stats. 3 & 4 Will. IV. c. 27, s. 34; 37 & 38 Vict. c. 57, s. 9; *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219.

(*m*) See *ante*, p. 516.

(*n*) *Ante*, pp. 472, 474.

copyholds is effected by surrender, in a similar manner, from the mortgagor to the use of the mortgagee and his heirs, subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. If the money should be duly paid on the day fixed, the surrender will be void accordingly, and the mortgagor will continue entitled to his old estate; but if the money should not be duly paid on that day, the mortgagee will then acquire at law an absolute right to be admitted to the customary estate which was surrendered to him; subject nevertheless to the equitable right of the mortgagor, confining the actual benefit derived by the former to his principal money, interest and costs. The mortgagee, however, is seldom admitted, unless he should wish to enforce his security, contenting himself with the right to admittance conferred upon him by the surrender; and, if the money should be paid off, all that will then be necessary will be to procure the steward to insert on the Court rolls a memorandum of acknowledgment, by the mortgagee, of satisfaction of the principal money and interest secured by the surrender (*o*). If the mortgagee should have been admitted tenant, he must, of course, on repayment, surrender to the use of the mortgagor, who will then be re-admitted. The provisions of the Conveyancing Act of 1881, by which estates of inheritance vested in a sole mortgagee devolve on his personal representatives (*p*), originally applied to copyholds as well as freeholds (*q*). But by the Copyhold Act, 1887 (*r*), now replaced by the Copyhold Act, 1894 (*s*), these provisions shall not apply to

(*o*) 1 Scriv. Cop. 242; 1 Watk. Cop. 117, 118.

(*p*) *Ante*, p. 534.

(*q*) *Re Hughes*, W. N. 1884, p. 53.

(*r*) Stat. 50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 40 Ch. D. 14.

(*s*) Stat. 57 & 58 Vict. c. 46, s. 88. The Land Transfer Act, 1897, does not, as we have seen, affect the devolution on death of any legal estate in copyholds; *ante*, p. 463.

land of copyhold or customary tenure *vested in the tenant on the Court rolls* of any manor by way of mortgage. When a mortgagee of copyholds of inheritance has been admitted tenant, his estate will therefore pass to his heir or devisee: but if he has not been admitted, it appears that his estate will devolve on his executors or administrators. The conditional surrender of copyholds by way of mortgage is usually preceded by a deed of covenant to surrender executed by the mortgagor, in which the power of sale was formerly inserted (*t*). The statutory power of sale (*u*) may now be incorporated in such a deed.

Mortgage of leaseholds.

Leasehold estates may be mortgaged by assignment of the term to the mortgagee, subject to a proviso for re-assignment on payment of the money advanced on a given day. But in such a case, as the mortgagee is assignee of the term, he becomes liable to the landlord for payment of the rent and performance of the covenants of the lease (*x*). It is therefore usual, when the rent and covenants are onerous, to mortgage leaseholds by demise or underlease of the premises for a term less by a day or two than the term granted by the lease, with a proviso for surrender of the term granted by the mortgage on payment of the amount lent with interest on the day appointed. In such cases the mortgagee does not become the landlord's tenant, and is not liable on the covenants in the lease (*y*): but his security is, of course, only the term created by the underlease by way of mortgage. A declaration is however often inserted in such mortgages that the mortgagor shall hold his reversion in the original term on trust for the mortgagee, subject to redemption. The statutory powers of sale and leasing will now be incorporated in a deed of mortgage of lease-

(*t*) Davidson. Prec. Conv. Vol. II. Part II. pp. 113. 405. 4th ed.
(*u*) *Ante*, p. 541.
(*x*) *Ante*, p. 497.
(*y*) *Ante*, p. 509.

holds, whether by assignment or demise, in the absence of provision to the contrary (*z*).

Equitable mortgages.

Besides the mortgages already described, which give the mortgagee a *legal* proprietary right in the lands pledged to him, there are equitable mortgages (*a*), by which lands are charged in *equity* only. Equitable charges arise upon the mortgage of an equity of redemption (*b*) or other equitable estate, or when the legal owner of lands pledges them by a signed writing without deed (*c*), or by deposit of the title deeds with the mortgagee. For, notwithstanding the stringent provision of the Statute of Frauds to the contrary (*d*), it was held by the Court of Chancery that such a deposit, even without any writing, operated as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds (*e*). This doctrine still remains; and the same doctrine applies to copies of Court roll relating to copyhold lands (*f*), for such copies are the title deeds of copyholders.

Deposit of title deeds.

Vendor's lien.

Another instance of an equitable charge is a vendor's lien. For when lands are sold, but the whole of the purchase-money is not paid, the vendor has a lien in equity on the lands for the amount unpaid, together with interest at four per cent., the usual rate allowed in equity (*g*). And the circumstance of the vendor having taken from the purchaser a bond or a note for the

(*z*) *Ante*, pp. 537, 541.

(*a*) See *ante*, p. 532, n. (*y*), as to the stamp duty on equitable mortgages.

(*b*) See *ante*, pp. 531, 535.

(*c*) See *ante*, pp. 143, 186, 210, 490, 504.

(*d*) 29 Car. II. c. 3, ss. 1, 3; *ante*, p. 153.

(*e*) *Russell* v. *Russell*, 1 Bro. C. C. 269. See *Ex parte Haigh*, 11 Ves. 403. There must be an actual deposit; *Re Betham*, *Ex parte Broderick*, 18 Q. B. D. 380, 3 Times L. R. 489.

(*f*) *Whitbread* v. *Jordan*, 1 You. & Coll. 303; *Lewis* v. *John*, 1 C. P. Coop. 8. See, however, Sugd. V. & P. 630, 13th ed.; *Jones* v. *Smith*, 1 Hare, 56, 1 Phill. 244.

(*g*) *Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; *Mackreth* v. *Symmons*, 15 Ves. 328; Sugd. V. & P. 670.

payment of the money will not destroy the lien (*h*). But if the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone.

Sale for annuity.

If the sale be made in consideration of an annuity, it appears that a lien will subsist for such annuity (*i*), unless a contrary intention be inferred from the nature of the transaction (*k*).

A stipulation to raise the interest on failure of punctual payment is void.

A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practised by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor; whereas the very same effect may be effectually accomplished by other words. If the stipulation be, that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation, being for the benefit of the mortgagor, is valid, and will be allowed to be enforced (*l*).

But a stipulation to diminish the interest on punctual payment is good.

Mortgages to trustees.

The loan of money on mortgage is an investment frequently resorted to by trustees, when authorized by their trust to make such use of the money committed to their care: in such a case, the fact that they are trustees, and the nature of their trust, are usually omitted in the mortgage deed, in order that the title of the mortgagor or his representatives may not be affected by the trusts. It is, however, a rule of equity, that when money is advanced by more persons than one,

(*h*) *Grant* v. *Mills*, 2 V. & B. 306, 13 R. R. 101; *Winter* v. *Anson*, 3 Russ. 488.

(*i*) *Matthew* v. *Bowler*, 6 Hare, 110.

(*k*) *Buckland* v. *Pocknell*, 13 Sim. 496; *Dixon* v. *Gayfere*, 21 Beav. 118, 1 De G. & J. 655.

(*l*) *Strode* v. *Parker*, 2 Vern. 316, 3 Burr. 1374; 1 Fonb. Eq. 398. See *Union Bank of London* v. *Ingram*, 16 Ch. D. 53.

it shall be deemed, unless the contrary be expressed, to have been lent in equal shares by each (*m*); if this were the case, the executor or administrator of any one of the parties would, on his decease, be entitled to receive his share (*n*). In order, therefore, to prevent the application of this rule, it was usual to declare, in all mortgages made to trustees, that the money was advanced by them on a joint account, in equity as well as at law, and that, in case of the decease of any of them in the lifetime of the others, the receipts of the survivors or survivor should be an effectual discharge for the whole of the money. And now by the Conveyancing Act of 1881 (*o*) provisions having the effect of the joint account clause previously usual are incorporated, in the absence of stipulation to the contrary, in every mortgage, obligation for payment of money, and transfer of mortgage or obligation made after the year 1881, in which the money secured is expressed to be advanced by or owing to more persons than one out of or as money belonging to them on a joint account, or which is made to more persons than one jointly, and not in shares.

Joint account clause.

As the interest even of an equitable mortgagee is an interest in land, it was held, under the Judgments Act, 1838 (*p*), that judgment debts against a mortgagee were a charge upon his interest in the mortgaged lands (*q*). But it was afterwards provided (*r*), that where any mortgage should have been paid off prior to, or at the time of, the conveyance of the lands to a purchaser or mortgagee for valuable consideration, the lands should be discharged both from the judgment and Crown debts of

Judgment debts a charge on mortgagee's interest in the lands.

(*m*) 3 Atk. 734; 2 Ves. sen. 258; 3 Ves. jun. 631.

(*n*) *Petty* v. *Styward*, 1 Cha. Rep. 57, 1 Eq. Ca. Ab. 290; *Vickers* v. *Cowell*, 1 Beav. 529.

(*o*) Stat. 44 & 45 Vict. c. 41, s. 61; as to the effect of which, see Wms. Conv. Stat. 238—240. 498.

(*p*) Stat. 1 & 2 Vict. c. 110, s. 13; *ante*, pp. 264, 407.

(*q*) *Russell* v. *M'Culloch*, 1 Kay & J. 313.

(*r*) Stat. 18 & 19 Vict. c. 15, s. 11; *Greaves* v. *Wilson*, 25 Beav. 134.

New enactment.

the mortgagee. And as we have seen, by the Judgments Act, 1864 (*s*), the lien of all judgments, of a date later than the 28th of July, 1864, was abolished. This provision is, however, repealed by the Land Charges Act, 1900 (*t*), under which a judgment shall not operate as a charge on land until a writ or order for enforcing it is duly registered.

Transfer of mortgages.

Mortgages are frequently transferred from one person to another. The mortgagee may wish to be paid off, and another person may be willing to advance the same or a further amount on the same security. In such a case the mortgage debt and interest are assigned by the old to the new mortgagee; and the lands which form the security are conveyed, or if leasehold assigned, by the old to the new mortgagee, subject to the equity of redemption which may be subsisting in the premises; that is, subject to the right in equity of the mortgagor or his representatives to redeem the premises on payment of the principal sum secured by the mortgage, with all interest and costs (*u*). Under the Conveyancing Act of 1881 (*x*), a mortgagor entitled to redeem now has power to require a mortgagee, who is not and has not been in possession, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person; and the mortgagee will then be bound to assign and convey accordingly.

Mortgagee may be compelled to transfer.

Mortgage of equity of redemption.

As we have seen (*y*), the equity of redemption belonging to the mortgagor may again be mortgaged by him; this may be either to the former mortgagee by way of further

(*s*) Stat. 27 & 28 Vict. c. 112. *ante*, p. 266.

(*t*) Stat. 63 & 64 Vict. c. 26. ss. 2, 5; *ante*, p. 267.

(*u*) As to the stamp on a transfer, see *ante*, p. 533: *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 270.

(*x*) Stat. 44 & 45 Vict. c. 41, s. 15, amended by stat. 45 and 46 Vict. c. 39, s. 12; see Wms. Conv. Stat. 119—124.

(*y*) *Ante*, p. 549.

charge, or to some other person. In order to prevent frauds by clandestine mortgages, it is provided by an Act of William and Mary (*c*), that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption. Unfortunately, however, in such cases the equity of redemption, after payment of both mortgages, is generally worth nothing. And if the mortgagor should again mortgage the lands to a third person, the Act will not deprive such third mortgagee of his right to redeem the two former mortgages (*a*). When lands are mortgaged, as occasionally happens, to several persons, each ignorant of the security granted to the other, questions generally arise as to the priority of the various charges. Such cases frequently illustrate the advantage of a *legal* proprietary right, which avails against all the world, over an *equitable* right which avails not against purchasers for value without notice (*b*). Thus the claim of a mortgagee, who has obtained the legal estate, will take precedence over any previous equitable charge, of which he had no *notice*, as well as over subsequent charges; and nothing short of connivance in fraud or gross negligence will deprive him of this advantage (*c*) : though he may be postponed to a subsequent charge created with his authority, as where he gives up the title deeds that money may be raised on a deposit of them (*d*). So if a mortgagee having the legal estate make a further advance without notice of an intermediate mortgage, he has a first charge on the lands for the whole amount of

(*c*) Stat. 4 & 5 Will. & Mary. c. 16. s. 3 : see *Kennard* v. *Futcroye*, 2 Gif. 81.

(*a*) Stat. 4 & 5 Will. & Mary. c. 16. s. 4.

(*b*) See *ante*, pp. 2, 3, 64, 179, 529, 534.

(*c*) See *Hewitt* v. *Loosemore*, 9 Hare, 449 ; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482 ; *Re Ingham*, 1893, 1 Ch. 352 ; *Oliver* v. *Hinton*, 1899, 2 Ch. 264.

(*d*) In such a case he will be postponed to the charge so created, even though his authority be exceeded as to the amount raised : see *Brocklesby* v. *Temperance, &c., Building Society*, 1895, A. C. 173.

Tacking.

his advances, which must be satisfied before the second mortgagee can receive anything thereout (*e*). And if a third or subsequent mortgagee, who had no notice, when he took his security (*f*), of any but a first mortgage, can procure a transfer to himself of the first mortgagee's legal estate, he may *tack*, as it is said, his own mortgage to the first, and so postpone any intermediate incumbrancer (*g*). But no claim of a mortgagee, who has secured the legal estate, will be preferred to a prior equitable charge, of which he had notice, when he advanced his money (*h*). As between themselves, equitable charges rank, as a rule, in the order in which they were created (*i*) : though one equitable mortgagee may be postponed to another, whose charge was subsequent to his own, on grounds of fraud or negligence (*k*). But the priorities of persons entitled to equitable charges on land are not affected, as between themselves, by the fact that some have and others have not given notice of their charges to the legal owner of the land, or by the order in which any such notices may have been given (*l*).

Mortgages of land in Middlesex and Yorkshire.

Mortgages or charges made by any deed or writing on land in Middlesex, Yorkshire or Kingston-upon-Hull, ought to be registered in the proper county register as well as purchase deeds (*m*). Under the Middlesex

(*e*) *Goddard* v. *Complin*, 1 Ch. Ca. 119 ; *Lloyd* v. *Attwood*, 3 De G. & J. 614, 656, 657.

(*f*) Subsequent notice is immaterial.

(*g*) *Marsh* v. *Lee*, 2 Vent. 337 ; *Brace* v. *Duchess of Marlborough*, 2 P. W. 491 ; *Bates* v. *Johnson*, Joh. 304; *Taylor* v. *Russell*, 1892. A. C. 244 : *Bailey* v. *Barnes*, 1894, 1 Ch. 25. An attempt was made to abolish tacking by stat. 37 & 38 Vict. c. 78, s. 7, repealed by 38 & 39 Vict. c. 87, s. 129.

(*h*) *Le Neve* v. *Le Neve*, Amb. 436, 446 ; *Birch* v. *Ellames*, 2 Anst. 427, 3 R. R. 601.

(*i*) *Jones* v. *Jones*, 8 Sim. 633 ; *Wilmot* v. *Pike*, 5 Hare, 14.

(*k*) See *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1 ; *Union Bank of London* v. *Kent*, 39 Ch. D. 238 ; *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182 ; *Re Castell and Brown, Ld.*, 1898, 1 Ch. 315.

(*l*) Above, note (*g*) : *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80, 91 ; *Re Richards*, 45 Ch. D. 589 ; *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.

(*m*) See *ante*, p. 206.

Registry Act, if more mortgages than one be made of the same piece of land, they have priority according to the date of registration (*u*); with this exception, that the claim of a mortgagee, who has obtained the legal estate without notice of any previous equitable charge and has duly registered his mortgage, will be preferred to the claims of those who may previously have obtained and registered merely equitable charges (*o*). But a mortgagee may be deprived of the priority given by this Act in consequence of the operation of the rule of equity already mentioned (*p*), which prevents a mortgagee, who has had clear previous notice of a prior unregistered charge, from gaining any priority of interest, with regard to the equitable estate in the land, by priority of registration (*q*). The registration of a conveyance of land in Middlesex is not equivalent to notice of the conveyance (*r*); so that the operation of *tacking* may be successfully performed by a third mortgagee of such land, if he have no notice of the second mortgage, notwithstanding that the second mortgage may have been registered (*s*). The provisions of the Middlesex Registry Act do not apply in the case of a mortgage of land in Middlesex made by deposit of title deeds *without* any written memorandum (*t*), or of a vendor's lien for unpaid purchase-money (*u*). In all these respects the law was formerly the same

(*u*) See *Neve* v. *Pennell*, 2 H. & M. 170.

(*o*) *Morecock* v. *Dickins*, Amb. 678.

(*p*) *Ante*, p. 207.

(*q*) See *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Bradley* v. *Riches*, 9 Ch. D. 189.

(*r*) *Morecock* v. *Dickins*, Amb. 678; Malins, V.-C., *Re Russell Road Purchase Moneys*, L. R. 12 Eq. 78, 83. But if a man searches the register, he will have notice of registered conveyances. See *Procter* v. *Cooper*, 1 Jur. N. S. 149.

(*s*) *Bedford* v. *Bacchus*, 2 Eq. Ca. Abr. 615, Case 12; *Cator* v. *Cooley*, 1 Cox, 182.

(*t*) *Sumpter* v. *Cooper*, 2 B. & Ad. 223; Wood, V.-C., *Neve* v. *Pennell*, 2 H. & M. 187; C. A., *Kettlewell* v. *Watson*, 26 Ch. D. 507. If the deposit of deeds be accompanied by any written document charging the land, the Act applies and the document ought to be registered: *Neve* v. *Pennell*, 2 H. & M. 170.

(*u*) See C. A., *Kettlewell* v. *Watson*, 26 Ch. D. 501, 507.

for land in Yorkshire as for land in Middlesex (*x*). But now, as we have seen (*y*), all assurances registered under the Yorkshire Registries Act, 1884 (*z*), shall have priority according to the date of registration, and no person shall lose any priority given by this Act merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. And it is provided (*a*), that after the commencement of this Act (*b*), there shall not be given or allowed to any estate or interest in lands in Yorkshire any priority or protection, which the same might otherwise have enjoyed, by reason of being protected by or tacked to any legal or other estate or interest in such lands; except as against any estate or interest which shall have existed prior to the commencement of the Act. No lien or charge on any lands in Yorkshire, in respect of any unpaid purchase-money or by reason of any deposit of title deeds, will have any effect or priority against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum of such lien or charge has been registered in accordance with the provisions of the Act (*c*). Mortgages of lands to which the title is registered under the Land Transfer Acts, 1875 and 1897 (*d*), are subject to special laws, which will be considered in a subsequent chapter (*e*).

Mortgages of registered land.

Mortgage for future debts.

A mortgage may be made for securing the payment of money which may thereafter become due from the

(*x*) *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr. 609, Case 7; *Re Wight's Mortgage Trust*, L. R. 16 Eq. 41; *Credland* v. *Potter*, L. R. 10 Ch. 8; *Kettlewell* v. *Watson*, 26 Ch. D. 501, 507.

(*y*) *Ante*, p. 207 & n. (*c*).

(*z*) Stat. 47 & 48 Vict. c. 54, s. 12. Sect. 15 of this Act provided that the registration of any instrument under this Act should be deemed to constitute actual notice thereof, but was repealed by stat. 48 & 49 Vict. c. 26, s. 5.

(*a*) Stat. 47 & 48 Vict. c. 54, s. 16.

(*b*) The Act came into operation on the 1st January, 1885. See sect. 2.

(*c*) Sect. 7: *Battison* v. *Hobson*, 1896, 2 Ch. 401.

(*d*) See *ante*, p. 208.

(*e*) *Post*, Part VII.

mortgagor to the mortgagee (*f*). Where a mortgage extends to future advances, it has been decided, that the mortgagee cannot safely make such advances, if he have notice of an intervening second mortgage (*g*). Future advances.

There is one case in which the rules of equity singularly, and, as the late author thought, unduly favoured the mortgagee. If one person should have mortgaged lands to another for a sum of money, and subsequently have mortgaged other lands to the same person for another sum of money, the mortgagee was placed by the rules of equity in the same favourable position as if the whole of the lands had been mortgaged to him for the sum total of the money advanced. The mortgagor could not redeem either mortgage, after it had become absolute at law (*h*), without also redeeming the other: and the mortgagee might enforce the payment of the whole of the principal and interest due to him on both mortgages out of the lands comprised in either (*i*). This rule, known as the doctrine of consolidation of securities, was extended to the case of mortgages of different lands made to different persons by the same mortgagor becoming vested by transfer in the same mortgagee. In such a case, it was held that the mortgagee, who had taken a transfer of the different mortgages, might consolidate all his securities as against the original mortgagor (*k*), or his assignee of the equity of redemption of the whole of the lands (*l*). But as Effect of two mortgages by the same person. Consolidation of securities.

(*f*) As to the stamp duty on such a mortgage, see stat. 54 & 55 Vict. c. 39. s. 88. replacing 33 & 34 Vict. c. 97. s. 107.

(*g*) *Rolt* v. *Hopkinson*, 9 H.L.C. 514; *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722: *West* v. *Williams*, 1899, 1 Ch. 132. See also *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459.

(*h*) *Cummins* v. *Fletcher*, 14 Ch. D. 699. The right of a mortgagee to consolidate does not arise until the interest of the mortgagor has become an *equity of redemption*, 14 Ch. D. 708, 709, 712, 713, 715: see *ante*, pp. 530, 532.

(*i*) *Pope* v. *Onslow*, 2 Vern. 286: *Jones* v. *Smith*, 2 Ves. jun. 372. 376.

(*k*) *Selby* v. *Pomfret*, 1 J. & H. 336, 3 De G., F. & J. 595; *Harter* v. *Colman*, 19 Ch. D. 630. 639.

(*l*) *Vint* v. *Padget*, 2 De. G. & J.

against an assignee of the equity of redemption of part only of the lands so mortgaged a mortgagee could not consolidate his securities unless he should have acquired the right of consolidation previously to the assignment of the equity of redemption (*m*). The right of consolidation arose at the time when two or more mortgages made by the same mortgagor, or any of his predecessors in title, became vested in the same mortgagee and absolute at law (*n*).

Present law as to consolidation.

The right of a mortgagee to consolidate his securities is now partially abolished by the Conveyancing Act of 1881 (*o*), which enacts that a mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. But this provision applies only if and as far as a contrary intention is not expressed in the mortgage deeds, or *one of them;* and only where the mortgages, or one of them, are or is made after the year 1881. The rules of equity as to consolidation of securities thus appear still to remain in force in all cases in which the mortgages sought to be consolidated by a mortgagee were made before the year 1882, or in which one of the mortgages, though made after 1881, was created by a deed expressing an intention to exclude the application of the above enactment (*p*). A declaration of such an intention is not unfrequently inserted in mortgage deeds. It follows, therefore, that no person can safely lend money on a second mortgage. For, in addition to the risks of some

611; *Pledge* v. *White*, 1896, A. C. 187.

(*m*) *White* v. *Hillacre*, 3 Y. & C. Ex. 597, 608, 609; *Jennings* v. *Jordan*, 6 App. Cas. 698; *Harter* v. *Colman*, 19 Ch. D. 630; *Minter* v. *Carr*, 1894, 3 Ch. 498.

(*n*) *Cummins* v. *Fletcher*, 14 Ch. D. 699.

(*o*) Stat. 44 & 45 Vict. c. 41, s. 17.

(*p*) *Griffith* v. *Pound*, 45 Ch. D. 553.

third mortgagee getting in and *tacking* the first mortgage (*q*), there is this further danger, that the first mortgagee may have previously acquired a right to consolidate with his security some other mortgage, by which property of the same mortgagor has been charged for more than its value, and may, by exercising this right, exclude the second mortgage. The purchaser of an equity of redemption is exposed to similar risks. Hence, it follows, that, in the words of an eminent judge, "It is a very dangerous thing at any time to buy equities of redemption, or to deal with them at all" (*r*).

(*q*) *Ante*, p. 554. *Luck*, L. R. 1 Eq. 537, 549.
(*r*) Wood, V.-C., *Beeror* v.

PART V.

OF TITLE.

To have a good title to land is to have the essential part of ownership, namely, the right to maintain or recover possession of the land as against all others (*a*). In English law, all title to land is founded on possession (*b*). Thus a person, who is in possession of land, although wrongfully, has a title to the land, which is good against all except those, who can show a better title; that is, can prove that they or their predecessors had earlier possession, of which they were wrongfully deprived (*c*). For possession of land is *primâ facie* evidence of a seisin *in fee* (*d*); and he, who sues for the recovery of land of which another is in possession, must recover on the strength of his own title, and cannot found his claim on the weakness of the possessor's title (*e*). And not only does possession of land give a good title as against all but rightful owners

(*a*) *Ante*, pp. 2, 64, 449, 494; 2 Black. Comm. 195; L. Q. R. xi. 229.

(*b*) By the common law, every one, who brought a real or mixed action (*ante*, pp. 23, 64, n.), must have founded his claim on the previous possession of himself or his ancestor; Bract. fo. 284 a. 435 b; Litt. s. 170; 3 Black. Comm. 180, 195; Holmes on the Common Law, pp. 244—246; P. & M. Hist. Eng. Law, ii. 46, 79.

(*c*) Bract. fo. 30 b, 31 a, 52 a. 434 b, 435 a; *Doe* d. *Hughes* v. *Pycball*, Moo. & Malk. 346; *Doe* d. *Smith and Payne* v. *Webber*, 1 A. & E. 119; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(*d*) *Doe* d. *Graham* v. *Penfold*, 8 C. & P. 536; Cole on Ejectment, 211. And an estate by wrong especially is always an estate in fee simple; Williams on Seisin, 7, 8; *Leach* v. *Jay*, 9 Ch. D. 44.

(*e*) *Roe* d. *Haldane* v. *Harvey*, 4 Burr. 2484, 2487; Cole on Ejectment, 287; *Danford* v. *McAnulty*, 8 App. Cas. 456, 462; R. S. C. 1883, Order XXI. r. 21.

(whose claim, as we have seen, is founded on prior *possession*), but it also continually tends to bar the rights of all, who have such prior title (*f*). For if those, who are rightfully entitled to land, take no steps to assert their rights within the period prescribed by statute, their remedies will be barred and their title extinguished (*g*). So that possession of land for the prescribed period (*h*) will give a good title thereto, as against all the world.

The limitation of actions for the recovery of land is now regulated by a statute passed in 1833 as amended by an Act of 1874 (*i*), which, however, did not come into operation until the 1st of January, 1879. Under these statutes, no person shall make an entry or bring an action (*k*) to recover any land but within twelve (*l*) years next after the right to do so first accrued to him, or to some person through whom he claims (*m*). But when a written acknowledgment of the title of the person entitled to any land has been given to him or his agent, signed by the person in possession, the time for recovery of the land is extended to twelve years from such acknowledgment (*n*). If, however, when the right of entry or action first accrued, the person entitled was under the disability of infancy, coverture (if a woman), or unsoundness of mind, then the land may

Disabilities.

(*f*) *Leach* v. *Jay*, 9 Ch. D. 44.

(*g*) Stat. 3 & 4 Will. IV. c. 27, s. 34.

(*h*) See *Trustees, Executors and Agency Co.* v. *Short*, 13 App. Cas. 793.

(*i*) Stats. 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57. As to the limitation of the old real and mixed actions, which were abolished by the former statute, and the acquisition of title by long continued possession under the old law, see notes to *Nepean* v. *Doe*, 2 Smith L. C.; 3 Black. Comm. 189, 196; Bac. Abr. Limitation of Actions; Co. Litt. 114 b, 115 a; Litt. s. 170; Bract. fo. 31 a, 51 b, 437 b; Glanv. iii. 2, xiii. 32.

(*k*) See *ante*, p. 64.

(*l*) Formerly twenty; stat. 3 & 4 Will. IV. c. 27, s. 2.

(*m*) Stat. 37 & 38 Vict. c. 57, s. 1. See *Nepean* v. *Doe*, 2 M. & W. 894; *Warren* v. *Murray*, 1894, 2 Q. B. 648.

(*n*) Stats. 3 & 4 Will. IV. c. 27, s. 14; 37 & 38 Vict. c. 57, s. 9. See *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295; *Sanders* v. *Sanders*, 19 Ch. D. 373.

be recovered within six (*o*) years next after such person ceased to be under such disability or died, notwithstanding that the time otherwise limited for action may have expired (*p*): but the land cannot be recovered, even in case of disability, after the expiration of thirty years (*q*) from the time when the right first accrued (*r*). No extension of time is allowed for the disability of any person, other than the person to whom the right of entry or action first accrued (*s*). The right to recover land in respect of an estate in remainder or reversion or other future estate is deemed to have first accrued at the time when the same became an estate in possession; but if the person last entitled to any particular estate, on which any future estate was expectant, was not in possession of the land when his interest determined, a person becoming entitled in possession to a future estate can only recover the land within twelve years after the right of entry or action first accrued to such particular tenant or within six years after such future estate became vested in possession whichever period shall be the longer. And if the right of the particular tenant shall have been barred by the statute, no one can recover the land in respect of any subsequent estate created by any instrument executed or taking effect after the right of entry or action first accrued to such particular tenant (*t*). But if the right of a tenant in tail to recover any land shall have been barred by the statute, the land cannot be recovered by any person claiming under any estate, interest or right, which the tenant in

Estates in remainder or reversion.

After an estate tail.

(*o*) Formerly ten; stat. 3 & 4 Will. IV. c. 27, s. 16, which also included absence beyond seas in the list of disabilities. This was removed therefrom by stat. 37 & 38 Vict. c. 57, s. 4.

(*p*) Stat. 37 & 38 Vict. c. 57, s. 3; *Borrows* v. *Ellison*, L. R. 6 Ex. 128.

(*q*) Formerly forty; stat. 3 & 4 Will. IV. c. 27, s. 17.

(*r*) Stat. 37 & 38 Vict. c. 57, s. 5.

(*s*) Stat. 3 & 4 Will. IV. c. 27, s. 18.

(*t*) Stat. 37 & 38 Vict. c. 57, s. 2; *Pedder* v. *Hunt*, 18 Q. B. D. 565; *Re Devon's Settled Estates*, 1896, 2 Ch. 562.

tail might lawfully have barred (*u*); and if a tenant in tail die while time is running against him but before his right is barred, no person claiming under any such estate, &c., as aforesaid shall recover the land but within the period during which the tenant in tail might have recovered it had he continued to live (*x*). A person entitled to an estate to take effect after or in defeasance of an estate tail will also be barred from recovering the land, if the tenant in tail execute an assurance insufficient to bar the remainders, &c., expectant thereon (*y*), and any person continue in possession of the land by virtue of such assurance for twelve (*z*) years after the time when the tenant in tail, or his successor, might, without the consent of any other person, have executed a complete disentailing assurance (*a*). Persons entitled in equity to any estate in land must, as a rule, assert their rights within the same period as if they had been entitled to the like estate at law (*b*). But when any land shall have been vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to take action to recover the land shall be deemed to have first accrued at and not before the time at which the land shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (*c*). And the Statute of Limitations does not bar the claim of a *cestui que trust* against his trustee to recover any property held on an express trust, or the proceeds thereof retained by the trustee or previously received by him and converted to his own use, or for any fraud

As to equitable estates.

(*u*) *I.e.*, by a disentailing assurance; *ante*, p. 98; stat. 3 & 4 Will. IV. c. 27, s. 21.

(*x*) Sect. 22: *Goodall* v. *Skerratt*, 3 Drew. 216.

(*y*) See *ante*, p. 103.

(*z*) Formerly twenty; stat. 3 & 4 Will. IV. c. 27, s. 23.

(*a*) Stat. 37 & 38 Vict. c. 57, s. 6.

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 24.

(*c*) Stat. 3 & 4 Will. IV. c. 27, s. 25. See Lewin on Trusts, pp. 699 *sq.*, 708, 709, 6th ed., 1044 *sq.*, 1056, 1057, 10th ed.; *Patrick* v. *Simpson*, 24 Q. B. D. 128.

Concealed fraud.

or fraudulent breach of trust to which the trustee was party or privy (*d*). In every case of a concealed fraud, the right of any person to sue in equity for the recovery of any land, of which he or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered: but this shall not enable any owner of lands to sue in equity for the recovery thereof, or for setting aside any conveyance thereof on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time he made the purchase did not know and had no reason to believe that any such fraud had been committed (*e*). And nothing in the Statute of Limitations shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to sue may not be barred by virtue of that statute (*f*). The manner in which the rights of a mortgagor and mortgagee of land are affected by the Statutes of Limitation has been already noticed (*g*). The right to rents, whether rents service, rents seck or rents charge (*h*), and also the right to tithes when in the hands of laymen (*i*), is subject to the same period

Rents.

Tithes.

(*d*) Stats. 36 & 37 Vict. c. 66. s. 25, sub-s. 2: 51 & 52 Vict. c. 59, s. 8: Lewin on Trusts, 730 *sq.*, 735 *sq.*, 6th ed., 1093 *sq.*, 1100 *sq.*, 10th ed.

(*e*) Stat. 3 & 4 Will. IV. c. 27. s. 26: *Sturgis* v. *Morse*, 24 Beav. 541, 3 De G. & J. 1: *Oxtham* v. *Hoare*, L. R. 9 Eq. 571: *Vane* v. *Vane*, L. R. 8 Ch. 583: *Lawrance* v. *Norreys*, 15 App. Cas. 210: *Willis* v. *Howe*, 1893, 2 Ch. 545: see *Re McCallum*, 1901, 1 Ch. 143.

(*f*) Stat. 3 & 4 Will. IV. c. 27. s. 27.

(*g*) *Ante*, p. 545.

(*h*) See *Grant* v. *Ellis*, 9 M. & W. 113, deciding that the Statute of Limitations does not operate to bar the landlord's right to recover rent reserved on a lease for years: *De Beauvoir* v. *Owen*, 5 Ex. 166: *Archbold* v. *Scully*, 9 H. L. C. 360, 375: *Payne* v. *Esdaile*, 13 App. Cas. 613.

(*i*) Stat. 3 & 4 Will. IV. c. 27. s. 1: see *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459, deciding that this Act applies only as between rival claimants to tithes, and not

of limitation as the right to land (*k*). The time for bringing an action to enforce the right of presentation to a benefice is limited to three successive incumbencies, all adverse to the right of presentation claimed, or to the period of sixty years, if the three incumbencies do not together amount to that time (*l*); but whatever the length of the incumbencies, no such action can be brought after the expiration of 100 years from the time at which adverse possession of the benefice shall have been obtained (*m*). And in every case where the period limited by the Act is determined, the right and title of the person who might have taken proceedings for the recovery of the land, rent or advowson in question within the period, is extinguished (*n*). Money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, can only be recovered within twelve (*o*) years next after a present right to receive the same accrued to some person capable of giving a discharge therefor, or from the last payment of principal or interest on account thereof, or the last written and signed acknowledgment of the right thereto (*p*). And no proceedings can be taken to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or

Advowson.

Money charged on land.

as between the tithe-owner and the owner of the land subject to tithe. As to the time required to support a claim of *modus decimandi*, or exemption from or discharge of tithes, see stat. 2 & 3 Will. IV. c. 100, amended by 4 & 5 Will. IV. c. 83; *Salkeld* v. *Johnson*, 1 Mac. & G. 242. The circumstances under which lands may be tithe free are well explained in Burton's Compendium, ch. 6, sect. 4.

(*k*) See the enactments cited above with regard to the recovery of land.

(*l*) Stat. 3 & 4 Will. IV. c. 27, s. 30.

(*m*) Sect. 33.

(*n*) Stat. 3 & 4 Will. IV. c. 27, s. 34; *Scott* v. *Viron*, 3 Dru. & War. 388; *Sands to Thompson*, 22 Ch. D. 614.

(*o*) Formerly twenty; stat. 3 & 4 Will. IV. c. 27, s. 40.

(*p*) Stat. 37 & 38 Vict. c. 57, s. 8; *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, *ib.* 579; *Re Owen*, 1894, 3 Ch. 220.

of interest in respect of any such sum of money or legacy, or any damages in respect of such arrears, except within the time, within which the same would be recoverable if there were not any such trust (*q*).

Crown rights.

The Crown is not bound by the Statutes of Limitation of 1833 and 1874 (*r*): but by an Act of George III. (*s*) the rights of the Crown in all lands and hereditaments are barred after the lapse of sixty years.

Land registered under the Land Transfer Acts.

The acquisition by continued possession of a title adverse to or in derogation of that of the registered proprietor of registered land is regulated by a special provision of the Land Transfer Act, 1897 (*t*), which will be hereafter stated (*u*).

Prescription.

The title to purely incorporeal hereditaments, whether appendant, appurtenant or in gross, depends upon grant or upon prescription from immemorial user, by which a grant is implied.

Legal memory.

The time of legal memory was long since fixed at the beginning of the reign of King Richard I., by analogy to the time which, by a statute of Edward I. (*x*), was fixed for the limitation of the old writ of right (*y*). And in the absence of an express grant, a man might prescribe either that he and his ancestors had from time immemorial exercised a certain right in gross (*z*), or that he, being seised in fee of certain lands, and all those whose estate he had, had from time immemorial exercised as appendant or appurtenant to their own land certain rights, such as rights of common or way, over certain other lands (*a*). In both

(*q*) Stat. 37 & 38 Vict. c. 57, s. 10.

(*r*) See Shelford's Real Property Statutes, 109, 110. 9th ed.; Bac. Abr. Prerogative (E. 5, 7).

(*s*) Stat. 9 Geo. III. c. 16, amended by 24 & 25 Vict. c. 62, and extended to the Duke of Cornwall by 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, s. 2, and extended to Ireland by 39 & 40 Vict. c. 37.

(*t*) Stat. 60 & 61 Vict. c. 65, s. 12.

(*u*) *Post*, Part VII.

(*x*) Stat. of Westminster the First, 3 Edw. I. c. 39.

(*y*) Litt. sect. 170; 2 Inst. 238; 2 Black. Comm. 31. See *ante*, p. 94.

(*z*) *Welcome* v. *Upton*, 6 M. & W. 536; *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687.

(*a*) *Gateward's case*, 6 Rep. 59 b.

of these cases, proof of a user as of right, for twenty years or upwards, was formerly considered to afford a presumption of immemorial enjoyment (*b*). But this presumption might be effectually rebutted by proof that the enjoyment had in fact commenced within the time of legal memory (*c*); in which case the enjoyment for centuries would go for nothing. This is still the law with regard to prescriptions of the former kind, namely, prescriptions of immemorial user by a man and his ancestors (*d*). But with regard to prescriptions of the latter kind, where the owner of one tenement, sometimes called the dominant tenement, claims to exercise some right over another tenement, called the servient tenement, he may either still prove his rights as before (*e*), or he may have recourse to an Act of William IV. (*f*), called the Prescription Act, which has materially shortened the proof required, in all cases where a recent uninterrupted user as of right can be shown. By this Act no right of common or other profit or benefit, called in law-French *profit à prendre*, to be taken and enjoyed from or upon land (except tithes, rent, and services), shall, if actually taken and enjoyed by any person claiming right thereto without interruption for thirty years, be defeated by showing only that it was first enjoyed prior thereto; and if enjoyed for sixty years, the right is made absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*g*). For rights of way and other easements, watercourses and the use of water, the terms are twenty and forty years respectively, instead of thirty and sixty years (*h*). And when the access and use of

The Prescription Act.

Rights of common, &c.

Rights of way, &c.

(*b*) *Rex* v. *Joliffe*, 2 B. & C. 64.
(*c*) See *Jenkins* v. *Harvey*, 1 C. M. & R. 894, 895.
(*d*) *Shuttleworth* v. *Le Fleming*, *ubi supra*.
(*e*) *Warrick* v. *Queen's College*, *Oxford*, L. R. 6 Ch. 716, 728; *Aynsley* v. *Glover*, L. R. 10 Ch. 283.
(*f*) Stat. 2 & 3 Will. IV. c. 71.
(*g*) Sect. 1. See *Gardner* v. *Hodgson's Kc. Co.*, 1900. 1 Ch. 592.
(*h*) Sect. 2.

Light.

light for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*i*). The periods mentioned are periods next before some action or suit in which the claim is brought in question; and no act is deemed an interruption unless submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof and of the person making or authorizing the same to be made (*k*). The time during which any person, otherwise capable of resisting any claim, shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party thereto, is excluded from the above periods, except when the claim is declared absolute and indefeasible (*l*); provided that in the case of ways and watercourses, where the servient tenement shall be held for term of life or years exceeding three years, the time of enjoyment of the way or watercourse during such term is excluded from the computation of the period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof (*m*). The Crown is expressly bound by the provisions of the Prescription Act respecting *profits à prendre*, ways and water rights; but is not bound by those respecting light (*n*). The rights above mentioned

Disabilities, &c.

Rights over Crown lands.

(*i*) Sect. 3.

(*k*) Sect. 4; *Bennison* v. *Cartwright*, 5 B. & S. 1.

(*l*) Sect. 7.

(*m*) Sect. 8. See *Symonds* v. *Leaker*, 15 Q. B. D. 629.

(*n*) *Perry* v. *Eames*, 1891, 1 Ch. 658; *Wheaton* v. *Maple*, 1893, 3 Ch. 48.

may be lost by abandonment, of which non-user for twenty years or upwards is generally sufficient evidence, although a shorter period will suffice if an intent to abandon appear (*o*). Abandonment.

Although the possession of land is attended with the advantages before described (*p*), yet mere possession is, of course, not conclusive evidence of a title good against all the world. Some further proof or guarantee of title is required on a transfer of real property, unless the transferee is to take, without compensation, the risk of being ejected by some person who has a better title. In ancient times, as we have seen, conveyances of land were principally made from a superior to an inferior, as from the great baron to his retainer, or from a father to his daughter on her marriage (*q*). The grantee became the tenant of the grantor; and if any consideration were given for the grant, it more frequently assumed the form of services or annual rent than the immediate payment of a large sum of money (*r*). Under these circumstances, it may readily be supposed that, if the grantor were ready to warrant the grantee quiet possession, the title of the former to make the grant would not be very strictly investigated; and this appears to have been the practice in ancient times; every charter or deed of feoffment usually ending with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and for ever defend the feoffee and his heirs against all persons (*s*). Even if this warranty were not expressly inserted, still it would seem that the word Warranty

(*o*) See *Moore* v. *Rawson*, 3 B. & C. 332, 339; *Hale* v. *Oldroyd*, 14 M. & W. 789; *R.* v. *Chorley*, 12 Q. B. 515, 519; *Ward* v. *Ward*, 7 Ex. 838; *Crossley* v. *Lightowler*, L. R. 3 Eq. 279. 2 Ch. 478; Williams on Commons, 166.

(*p*) *Ante*, p. 560.

(*q*) See *ante*, p. 67.

(*r*) *Ante*, pp. 14, 46, 50, 68.

(*s*) Bract. fo. 17 a. As we have seen, the obligation of warranty originally formed part of the relation between feudal lord and tenant: and this obligation, in the days of subinfeudation, was a potent factor in the acquisition by a tenant in fee of the right to alien as against his heir; *ante*, pp. 38, 67.

Warranty implied by word *give*.

give, used in a feoffment, had the effect of an implied warranty; but the force of such implied warranty was confined to the feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee (*t*). Under an express warranty, the feoffor, and also his heirs, were bound, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title (*u*); and this warranty was binding on the heir of the feoffor, whether he derived any lands by descent from the feoffor or not (*x*), except only in the case of the warranty commencing, as it was said, by disseisin; that is, in the case of the feoffor making a feoffment with warranty of lands of which he, by that very act (*y*), disseised some person (*z*), in which case it was too palpable a hardship to make the heir answerable for the misdeed of his ancestor. But, even with this exception, the right to bind the heir by warranty was found to confer on the ancestor too great a power; thus, a husband, whilst tenant by the curtesy of his deceased wife's lands, could, by making a feoffment of such lands with warranty, deprive his son of the inheritance; for the eldest son of the marriage would usually be heir both to his mother and to his father; as heir to his mother he would be entitled to her lands, but as heir of his father he was bound by his warranty. This particular case was the first in which a restraint was applied by Parliament to the effect of a warranty, it having been enacted (*a*), that the son should not, in such a case, be barred by the warranty of his father, unless any heritage descended to him of his father's side, and then he was to be barred only to the extent of the value of the heritage so descended. The force of a warranty

Express warranty.

(*t*) 4 Edw. I. stat. 3. c. 6; 2 Inst. 275; Co. Litt. 384 a. n. (1).
(*u*) Co. Litt. 365 a.
(*x*) Litt. s. 712.
(*y*) Litt. s. 704; Co. Litt. 371 a.
(*z*) Litt. ss. 697—700.
(*a*) Stat. 6 Edw. I. c. 3.

was afterwards greatly restrained by other statutes, enacted to meet other cases (*b*); and the clause of warranty having been long disused in modern conveyancing, its chief force and effect were removed by clauses of two statutes of 1833, passed at the recommendation of the Real Property Commissioners (*c*).

Warranty now ineffectual.

The old warranty of title was better suited to the transactions of the feudal times, in which it originated, than to modern dealings with land. When a transfer of land takes the form of a sale for a sum of money paid down and representing the full value of the land, it is obviously desirable to require *proof* of the vendor's title before completing the sale, as well as a guarantee of compensation in case of his title afterwards proving to be defective. It has been accordingly established in modern times that, on every sale of land, the vendor is bound to show a good title thereto (*d*). The proof so required is furnished by his giving evidence of the exercise of acts of ownership, particularly of the power of disposition, by himself or his predecessors over the land sold for a certain number of years back, and by deducing from previous dispositions and devolution of the land a right in himself to the fee simple or other estate sold. A vendor of land is therefore bound to furnish at his own expense (*e*) to the purchaser an abstract of his title to the property sold. This abstract must contain a statement of the material parts of every deed, will, or other instrument, by which any disposition of the property was made during the time for which title has to be shown; it must also contain a statement of every birth, death, marriage, bankruptcy, or other

Proof of title required in modern times.

Vendor bound to show a good title.

Abstract of title.

(*b*) Stat. *De donis*, 13 Edw. I. c. 1, as construed by the judges; see Co. Litt. 373 b, n. (2); Vaughan, 375; stats. 11 Hen. VII. c. 20; 4 and 5 Anne, c. 3 (c. 16 in Ruffhead), s. 21.

(*c*) Stats. 3 & 4 Will. IV. c. 27, s. 39; 3 & 4 Will. IV. c. 74, s. 14.

(*d*) *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; Sug. V. & P. 16, 14th ed.; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507; *Ellis* v. *Rogers*, 29 Ch. D. 661, 670, 672.

(*e*) Sug. V. & P. 406; *Re Johnson & Tustin*, 30 Ch. D. 42.

Verification of abstract.

event material to the devolution of the estate contracted for (*f*). The vendor is further bound to verify the abstract by producing for examination by the purchaser or his solicitor the original deeds or documents abstracted, and the probates or office copies of the wills and other documents, of which the originals cannot be produced; also by furnishing proper evidence of every fact material to title (*g*). But the purchaser, in the absence of stipulation to the contrary, must now bear the expense of producing all documents of title, which are not in the vendor's possession (*h*), and of procuring all other evidence of title, which the vendor has not in his possession (*i*). The purchaser also bears all the expense of the examination of the title deeds by his solicitor (*k*). It is now a term of contracts for the sale of land, in the absence of stipulation to the contrary, that recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of such facts, matters and descriptions (*l*). This may, of course, save a vendor from the necessity of furnishing evidence, which he would otherwise be obliged to give.

Length of time for which a vendor must show title.

The vendor's obligation to show a *good* title is to show a good title according to the contract, *i.e.*, such a title as he has contracted to give (*m*). The length of time for which title shall be shown is very frequently

(*f*) See Sug. V. & P. Ch. XI. pp. 405 *sq.*: 1 Dart. V. & P. Ch. VIII. pp. 319 *sq.*, 6th ed.

(*g*) Sug. V. & P. 406. 414 *sq.*, 429—432. 447—450: 1 Dart. V. & P. pp. 159, 160, 350 *sq.*, 470, 6th ed.

(*h*) See *Re Willett and Argenti*, 5 Times L. R. 476: *Re Stuart, Olivant and Seadon's Contract*, 1896, 2 Ch. 328.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 6; see Wms. Conv. Stat. 47—50.

(*k*) See Sug. V. & P. 406, 429, 430; Wms. Conv. Stat. 47—50.

(*l*) Stat. 37 & 38 Vict. c. 78, s. 2; see Wms. Conv. Stat. 8—11.

(*m*) *Lawrie* v. *Lees*, 7 App. Cas. 19.

the subject of express agreement between buyers and sellers of land (*u*). But in the absence of stipulation to the contrary, a purchaser can now require title to be shown for the following periods. On the sale of a freehold (*o*) or copyhold estate, he can call for the title for the last forty years (*p*). But if the freehold sold should be land, formerly of copyhold or customary tenure, which has been enfranchised (*q*), he will not have the right to call for the title to make the enfranchisement (*r*). On the sale of leaseholds for years, he can require an abstract and production of the lease, whatever be its date. And if the lease be not more than forty years old, he can call for the subsequent title under the lease to the date of the contract: but if the lease be more than forty years old, all the subsequent title he can require is the title for the forty years next before the contract (*s*). And he will not in either case be entitled to call for the title to the freehold, or to any leasehold reversion (*t*). Not less than one hundred years' title must be shown to an advowson (*u*). Upon the sale of tithes or other property held under a grant from the Crown, the original grant must be shown, whatever be its date; after which, it appears, the title

Freeholds and copyholds.

Leaseholds for years.

Advowson.

(*u*) Any stipulation restricting the period, for which the purchaser would otherwise be entitled to require title to be shown, must be fair and explicit and must not contain any misrepresentation as to facts within the knowledge of the vendor, or it will not be binding on the purchaser, in case specific performance of the contract is sought; *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131; *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*o*) Whether of inheritance or for life or lives; see *ante*, p. 63.

(*p*) Stat. 37 & 38 Vict. c. 78, s. 1; see Wms. Conv. Stat. 2; 1 Dart, V. & P. 334, 6th ed.

(*q*) *Ante*, p. 467.

(*r*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 2; see Wms. Conv. Stat. 31.

(*s*) Sug. V. & P. 368, 370; *Frend* v. *Buckley*, L. R. 5 Q. B. 213; stat. 37 & 38 Vict. c. 78, s. 1; 1 Dart, V. & P. 294, 5th ed.; Williams on Real Property, 450, 13th ed.; *Gosling* v. *Woolf*, 1893, 1 Q. B. 39; see Wms. Conv. Stat. 2, 3.

(*t*) Stats. 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, s. 3, sub-s. 1; see Wms. Conv. Stat. 4, 5, 29.

(*u*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed., 334, 6th ed.; Williams on Real Property, 449—451, 13th ed.; see Wms. Conv. Stat. 2, 3.

for the forty years next before the contract is all that can be required (*x*). And upon the sale of a reversionary interest, its creation must be shown, whatever be its antiquity (*y*). Furthermore, if an abstract of title commence with an instrument of disposition, it must be such as will form what is called a good root of title; that is to say, it must, as a rule, be an instrument dealing with the whole estate, legal and equitable, in the property sold, containing a description by which the property can be identified, and containing nothing to cast any doubt on the title of the disposing parties. If it be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency (*z*). For example, if the abstract commence with a will containing a general devise of the testator's real estate, under which the property sold is alleged to have passed, the purchaser will be entitled to require evidence of the testator's seisin (*a*). But a conveyance in fee on a sale or by way of mortgage is a good root of title. It is obvious that, in consequence of the rule requiring a good root of title, a vendor may have to go back more than forty years, if he wish to commence his abstract with a document, which shall be free from objection (*b*).

Good root of title required.

Before the year 1875, the rule was that title might be required to be shown for sixty years, in all cases where forty years' title can now be called for (*c*). The origin of this rule is sometimes attributed to the fact that under the Statutes of Limitation applicable to the

Sixty years' title formerly required.

(*x*) Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed., 336, 6th ed.

(*y*) 1 Dart, V. & P. 294, 5th ed., 335, 6th ed.; see Wms. Conv. Stat. 3. 4.

(*z*) See 1 Dart, V. & P. Ch. VIII. s. 4. pp. 295 *sq.*, 5th ed., 337 *sq.*, 6th ed.

(*a*) See *Parr* v. *Lovegrove*, 4 Drew. 170.

(*b*) As a rule, the purchaser now has no right to inquire into or require evidence of, or object to the title prior to the time fixed, by the contract or by law, for the commencement of title: but to this rule there are several important exceptions: see stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 3; Wms. Conv. Stat. 31—41, 531—535; *Nottingham Patent Brick & Tile Co.* v. *Butler*, 16 Ch. D. 778.

(*c*) Sug. V. & P. 365 *sq.*, 407; *Cooper* v. *Emery*, 1 Ph. 388.

old real and mixed actions (*d*) nothing less than sixty years' possession would bar adverse claims to the land (*e*). But even sixty years' possession will not necessarily give a sure title to land, as against all the world; for if the land had been limited for an estate tail or for life, the right of the reversioner or remainderman to enter into possession would not accrue till after the determination of the particular estate (*f*); and under the present (*g*) as well as the old (*h*) Statutes of Limitation, circumstances might occur to render possible the recovery of land by a reversioner or remainderman more than sixty years after the dispossession of the tenant in tail or for life. Another reason is accordingly given for the rule; namely, that the term of sixty years corresponds with the ordinary duration of human life, and inquiry into the title for the duration of an ordinary lifetime affords some safeguard against the existence of the adverse claims, which might not have accrued until the death of a particular tenant (*i*). The period of sixty years was reduced to forty by the Vendor and Purchaser Act, 1874 (*k*), on no other ground, apparently, than that in practice purchasers were generally found willing to accept a forty years' title.

Sale of land subject to incumbrances.

It is not necessary for a vendor of land to show that he is himself absolutely entitled to the whole estate contracted to be sold; a good title will have been shown if it appear that the vendor has an equitable interest enabling him to procure the conveyance of the estate

(*d*) See *ante*, p. 561, n.(*i*).

(*e*) See stat. 32 Hen. VIII. c. 2; 3 Black. Comm. 193—196; Sug. V. & P. 365.

(*f*) *Ante*, pp. 323, 333—336.

(*g*) *Ante*, pp. 561—565.

(*h*) See Sug. V. & P. 609, 11th ed., 366, 14th ed.; 1 Prest. Abst. 20—22, 2nd ed.

(*i*) See Mr. Brodie's opinion, 1 Hayes's Conveyancing, 564; 1 Ph. 389.

(*k*) Stat. 37 & 38 Vict. c. 78, s. 1. In the same way the further restrictions on a purchaser's rights made by the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41, s. 3: *ante*, pp. 571—574) appear to have been introduced because purchasers commonly submitted to like restrictions by express agreement; see Wms. Conv. Stat. 29 *sq.*

to the purchaser (*l*). If any other persons, besides the vendor, be interested in the land sold, the abstract of title will of course disclose their names and the nature of their interests. And if the vendor desire to complete the sale without resorting to the aid of the Court, the concurrence of all these parties must be obtained by him, in order that an unincumbered estate, in fee simple or otherwise as contracted for, may be conveyed to the purchaser. Thus, if the lands be in mortgage, the mortgagee must be paid off out of the purchase-money, and must join to relinquish his security and convey the legal estate (*m*). If the widow of any previous owner is entitled to dower out of the lands (*n*), she must concur in the conveyance; if the lands are subject to a rent-charge (*o*), the person entitled thereto must join to release the lands from his charge. In the absence of stipulation to the contrary, the expense of the concurrence in the conveyance to the purchaser of all necessary parties, other than the vendor, must be paid by the vendor (*p*). Under the Conveyancing Act of 1881 (*q*), upon the sale of land subject to any mortgage, lien or charge, whether of a capital or an annual sum, the Court has power to allow payment into Court of a sum of money sufficient to provide for the amount charged on the land and future costs, and thereupon to declare the land to be freed from the charge, and to make any order for conveyance, or vesting order, proper for giving effect to the sale. This enables a vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate, without the concurrence of the incumbrancers. If the land sold be

(*l*) See 8 Ves. 436; *Townsend v. Champernown*, 1 Y & J. 449; Sug. V. & P. 217, 218, 349, 423—425; Dart. V. & P. 321—326, 1177 *sq.*, 6th ed.; *Re Bryant and Barningham's Contract*, 44 Ch. D. 218.

(*m*) *Ante*, p. 533.

(*n*) *Ante*, pp. 315 *sq.*

(*o*) *Ante*, pp. 417 *sq.*

(*p*) Sug. V. & P. 557, 558, 561; 2 Dart. V. & P. 798, 814, 6th ed.; 1 Davidson, Prec. Conv. 570—572, 612, 4th ed.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 5; see s. 2 (vii).

charged with succession or estate duty (*r*), the duty must be paid before completion of the purchase.

Proof of title on mortgage.

On every mortgage of land, the title is investigated in the same manner as upon a sale; for to acquire a good marketable title is of even greater importance to a mortgagee, who only wants security for his money, than to a purchaser, who may buy for occupation. A good *marketable* title is one, which will enable the party acquiring it to sell the property without the necessity of making special conditions of sale restrictive of the purchaser's rights. As we have seen, a mortgagee's power of sale affords the best means of realizing his security (*s*); and he cannot safely accept a title, which is at all likely to hamper the exercise of his most efficient remedy. Here it may be pointed out that the relation of intended mortgagor and mortgagee is very different from that of vendor and purchaser. A vendor and purchaser of land are parties to a contract, which may be decreed to be specifically enforced, at the instance of either of them, under the equitable jurisdiction of the Court (*t*). Hence their respective rights are strictly defined from the moment they have signed the contract for sale (*u*). But it is not usual for mortgagees to bind themselves by contract in contemplation of making a loan on real security (*x*); and even if they were to do so, the Court will not specifically enforce an agreement to lend or borrow money (*y*).

Good marketable title.

Proof of title on contract to grant lease.

Upon a contract to grant a lease for a term of years, the rule formerly was that the intended lessor might be called upon to show a good title, the grant of a lease

(*r*) *Ante*, pp. 236, 257—260, 406.

(*s*) *Ante*, p. 541.

(*t*) See 3 Seton on Decrees, 1834, 1849, *sq.*, 5th ed.; 2 Dart. V. & P. Ch. XVIII.; *ante*, p. 162, n. (*c*).

(*u*) See *ante*, pp. 182, 186, 571.

(*x*) Davidson Prec. Conv. Vol. II. Part II. p. 104, n. (*a*), 4th ed.

(*y*) *Rogers* v. *Challis*, 27 Beav. 175; *Sichel* v. *Mosenthal*, 30 Beav. 371; *South African Territories, Ld.* v. *Wallington*, 1898, A. C. 309.

being regarded as equivalent, in this respect, to the sale of a leasehold interest (*z*). But now, in the absence of stipulation to the contrary, the intended lessee has no right, under such a contract, to call for the title to the freehold (*a*). Upon a contract for an *underlease*, however, the proposed lessee still has the right to call for an abstract and production of the lease, under which his intending lessor holds, and of the subsequent or the last forty years' title thereunder, in the same manner as if he had contracted to buy the lease (*b*). But he has now no right, in the absence of stipulation to the contrary, to call for the title to any leasehold *reversion* expectant on any lease, under which his proposed lessor holds (*c*). The covenants and conditions, which can be required to be inserted in a lease, in the absence of special stipulation, have been already referred to (*d*).

Title-deeds.

On the completion of any sale or mortgage of land, the purchaser or mortgagee becomes entitled to all documents of title, which relate exclusively to the property dealt with (*e*); and these are always handed over to him.

Importance of their possession.

The possession of the title-deeds is of the greatest importance; for if the deeds were not required to be delivered, it is evident that property might be sold or mortgaged over and over again to different persons, without much risk of discovery. The only guarantee, for instance, which a purchaser has that the lands he contracts to purchase have not been mortgaged, is that

Registration.

the deeds are in the possession of the vendor. It is true that in the counties of Middlesex and York, registries have been established, a search in which will lead to the detection of all dealings with the property (*f*);

(*z*) *Roper* v. *Coombes*, 6 B. & C. 534; Sug. V. & P. 367, n. (l); *Stranks* v. *St. John*, L. R. 2 C. P. 376.

(*a*) Stat. 37 & 38 Vict. c. 78, s. 2; *Jones* v. *Watts*, 43 Ch. D. 574.

(*b*) *Ante*, p. 573.

(*c*) Stat. 44 & 45 Vict. c. 41. s. 13.

(*d*) *Ante*, p. 496, n. (*l*).

(*e*) Sug. V. & P. 407, 433; *Re Duthy & Jesson's Contract*, 1898, 1 Ch. 419.

(*f*) See *ante*, pp. 206, 554.

but these registries, though existing in Scotland and Ireland, do not extend to the remaining counties of England or to Wales. Generally speaking, therefore, the possession of the deeds is all that a purchaser has to depend on: in most cases, this protection, coupled with an examination of the title they disclose, is found to be sufficient: but there are certain circumstances in which the possession of the deeds can afford no security. Thus the possession of the deeds is no safeguard against an annuity or rent-charge payable out of the lands; for the grantee of a rent-charge has no right to the deeds (*g*). So the possession of the deeds, showing the conveyance to the vendor of an estate in fee simple, is no guarantee that the vendor is not now actually seised only of a life estate; for, since he acquired the property, he may, very possibly, have married; and on his marriage he may have settled the lands on himself for his life, with remainder to his children. Being then tenant for life, he will, like every other tenant for life, be entitled to the custody of the deeds (*h*); and if he should be fraudulent enough to suppress the settlement, he might make a conveyance from himself, as though seised in fee, deducing a good title, and handing over the deeds; but the purchaser, having actually acquired by his purchase nothing more than the life interest of the vendor, would be liable, on his decease, to be turned out of possession by his

Possession of deeds no safeguard against a rent-charge;

nor against the vendor being tenant for life only.

(*g*) The late author once met with an instance in which lands were, from pure inadvertence, sold as free from incumbrance, when in fact they were subject to a rent-charge, which had been granted by the vendor on his marriage to secure the payment of the premiums of a policy of insurance on his life. The marriage settlement was, as usual, prepared by the solicitor for the wife; and the vendor's solicitor, who conducted the sale, but had never seen the settlement, was not aware that any charge had been made on the lands. The vendor, a person of the highest respectability, was, as often happens, ignorant of the legal effect of the settlement he had signed. The charge was fortunately discovered by accident shortly before the completion of the sale.

(*h*) Sug. Vend. & Pur. 445, n. (1); *Leathes* v. *Leathes*, 5 Ch. D. 221. Even an equitable tenant for life has been declared entitled to the custody of the title-deeds: *Re Burnaby's Settled Estates*, 12 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369; see *Re Newen*, 1894, 2 Ch. 297.

children; for, as marriage is a valuable consideration, a settlement then made cannot be set aside by a subsequent sale made by the settlor. Against such a fraud as this the registration of deeds seems the only protection. In some cases, also, persons are entitled to an interest, which they would like to sell, but are prevented, from not having any deeds to hand over. Thus, if lands be settled on A. for his life, with remainder to B. in fee, A. during his life will be entitled to the deeds; and B. will find great difficulty in disposing of his reversion at an adequate price; because, having no deeds to give up, he has no means of satisfying a purchaser that the reversion has not previously been sold or mortgaged to some other person. If, therefore, B.'s necessities should oblige him to sell, he will find the want of a registry for deeds the cause of a considerable deduction in the price he can obtain. It may here be remarked, that as few people would sell a reversion unless they were in difficulties, equity, whenever a reversion was sold, threw upon the purchaser the onus of showing that he gave the fair market price for it (*i*). But it is now provided that no purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (*k*).

Difficulty in sale of a reversion, for want of evidence that no previous sale has been made.

Sale of reversions.

New enactment.

Again, if lands are subject to any mortgage made before the year 1882, there may be a difficulty in dealing with them on account of the absence of title-deeds. For a mortgagee under such a mortgage who has possession of the title-deeds, cannot as a rule be compelled to produce them for inspection, without being paid off (*l*).

Mortgagor could not inspect deeds in possession of mortgagee except by consent.

(*i*) *Lord Aldborough* v. *Trye*, 7 Cl. & Fin. 436; *Davies* v. *Cooper*, 5 My. & Cr. 270; Sug. V. & P. 278; *Edwards* v. *Burt*, 2 De G. M. & G. 55.

(*k*) Stat. 31 Vict. c. 4. See *Lord Aylesford* v. *Morris*, L. R. 8 Ch. 484; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; *Fry* v. *Lane*, 40 Ch. D. 312.

(*l*) *Chichester* v. *Marquis of Donegall*, L. R. 5 Ch. 497; Sug. V. & P. 435, 445. See 1 Dart, V. & P. 475, 6th ed.;

With regard, however, to mortgages made after the year 1881, it is enacted by a section of the Conveyancing Act of 1881 (*m*), which has effect notwithstanding any stipulation to the contrary, that a mortgagor, as long as his right to redeem subsists, shall, by virtue of that Act, be entitled, at his own cost, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. New enactment.

Where the documents of title relate, not only to the land sold, but also to other property, which the vendor retains, he is entitled to retain the documents (*n*). Where the title-deeds cannot be delivered over to a purchaser, he is entitled to require the vendor to give or procure him a statutory written *acknowledgment* of his right to their production, and to delivery of copies thereof (*o*). When such an acknowledgment is given by a person, who retains possession of documents, it has the effect provided in the 9th section of the Title-deeds relating to other land. Acknowledgment of right to production of documents.

Seton on Decrees, 1611, 5th ed.; Davidson, Prec. Conv. Vol. II., Part II., p. 251, 4th ed.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 16.

(*n*) Stat. 37 & 38 Vict. c. 78, s. 2. This rule does not apply to the case of a mortgage, as to which see Davidson, Prec. Conv. Vol. II. Part II. 238 *sq.*, 253, 4th ed.

(*o*) In such cases the purchaser was formerly entitled to a *covenant* for production of the title-deeds; but now any liability to give such a covenant will be satisfied by the statutory acknowledgment. The purchaser was also entitled to require attested copies to be furnished to him, at the vendor's expense, of any documents of which he was entitled to a covenant for production, except instruments on record. But, though he is still entitled to have such attested copies, the rule now is that he must bear the expense of them himself. The statutory acknowledgment must also be prepared at the purchaser's expense, but the vendor must bear the expense of the perusal and execution thereof on behalf of and by himself and all necessary parties other than the purchaser. A purchaser is entitled to the statutory acknowledgment in respect of all such documents, not delivered to him, as are necessary to make a good title according to the contract; except documents in public or official custody and other documents (not being in the vendor's possession or power), of which the purchaser can obtain good evidence himself, as deeds of bargain and sale enrolled or copies of court roll. See *Cooper* v. *Emery*, 1 Ph. 388; Sug. V. & P. 34, 446—450, 453; stats. 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, ss. 3 (sub-s. 6), 9 (sub-s. 8); Wms. Conv. Stat. 12—14, 48. Attested copies.

Conveyancing Act of 1881 (*p*); which is, shortly, to impose on every possessor of the documents, during such time only as they remain in his possession or control, an obligation to produce them whenever reasonably required for proving or supporting the title of any person entitled to the benefit of the acknowledgment, and to deliver to him true copies of or extracts from them. This obligation will be enforceable by, but at the expense of, the person to whom the acknowledgment is given, or any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under him, or otherwise becoming through or under him interested in or affected by the terms of any of the documents. The statutory acknowledgment does not confer any right to damages for loss or destruction of, or injury to the documents to which it relates (*q*). But, under the same 9th section of the Conveyancing Act, 1881, if a person retaining possession of documents gives to another a written undertaking for safe custody thereof, that will impose on every possessor of the documents, so long as he has possession or control of them, an obligation to keep them safe, whole, uncancelled and undefaced, unless prevented from doing so by fire or other inevitable accident (*r*). A purchaser entitled to require a statutory acknowledgment for production of documents would appear to be also entitled, as a rule, to require an undertaking for their safe custody (*s*). So that a vendor, who desires to limit his liability to that

Undertaking for safe custody of documents.

(*p*) Stat. 44 & 45 Vict. c. 41. See Wms. Conv. Stat. 94. A statutory acknowledgment, unless given by deed, appears to require the same stamp as an agreement; see *ante*, p. 187, n. (*c*).

(*q*) Stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 6.

(*r*) Stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 9.

(*s*) The common form of the covenant for production of title-deeds in use before 1882 (*ante*, p. 581, n. (*l*)), included a covenant for safe custody. And the statutory undertaking will now satisfy any liability to give a covenant for safe custody of documents. See 1 Davidson, Prec. Conv. 222, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 11; Wms. Conv. Stat. 101, 102.

imposed by the statutory acknowledgment, should be careful to stipulate expressly that he will give no undertaking for the safe custody of any documents retained. Such a stipulation is usually made on sales by trustees. An acknowledgment of right to production of title-deeds, to take effect under the statute, must be given by the person who retains possession of the deeds; and this will not necessarily be the vendor. Thus if part of an estate in mortgage be sold by the mortgagor with the concurrence of the mortgagee, the latter will be the person who retains possession of the title-deeds (*t*). In this case therefore the vendor, to satisfy his liability to the purchaser (*u*), must, if he can, procure the statutory acknowledgment to be given by the mortgagee (*x*). But it will be no objection to the title, that the vendor is unable to procure for the purchaser a statutory acknowledgment from the person in possession of the title-deeds, if the purchaser will have an equitable right to their production independently of any acknowledgment (*y*). It appears that, when part of an estate is sold and the vendor retains the title-deeds, the purchaser will have an equitable right to their production in proof of his title, without any express agreement therefor (*z*).

Search in Middlesex and York registries.

When the lands sold or to be mortgaged are situated in either of the counties of Middlesex or York, search is made in the registries established for those counties, to discover if there be any registered assurance affecting the lands, which has not been disclosed by the

(*t*) See *ante*, p. 578.

(*u*) *Ante*, p. 581.

(*x*) Under the practice before 1882, a covenant for production of the title-deeds should have been entered into by the person entitled to their possession in respect of the legal estate in the land; see Sug. V. & P. 453 and n. (1); 1 Dart, V. & P. 554, 556, 5th ed.; 1 Davidson, Prec. Conv. 590, 591, 4th ed.

(*y*) Stat. 37 & 38 Vict. c. 78, s. 2; see Wms. Conv. Stat. 12.

(*z*) *Fain* v. *Ayers*, 2 S. & S. 533, 535; Sug. V. & P. 445, n. (1). 453, n. (1).

abstract (*a*); and a memorial of the conveyance is of course duly registered as soon as possible after its execution. As to lands in all other counties also, there are certain matters affecting the title, of which every purchaser can readily obtain information. Thus, if any estate tail has existed in the lands, the purchaser can always learn whether or not it has been barred; for the records of all fines and recoveries, by which the bar was formerly effected (*b*), are preserved in the Public Record Office (*c*); and the deeds, which have been substituted for those assurances, were required to be enrolled, formerly in the Court of Chancery (*d*), and since the year 1879 in the Central Office of the Supreme Court (*e*). Conveyances executed by married women under the provisions of the Fines and Recoveries Act before the year 1883 can also be discovered by a search in the index of the certificates of the acknowledgment of such deeds (*f*), which is now kept at the same Central Office (*g*). So we have seen that search is always made in the register of writs and orders affecting land, in order to discover if the land has been taken in execution (*h*); also for registered pending actions, by which the purchaser or mortgagee would be bound (*i*). Again, until the 1st of July, 1901, when the Land Charges Act,

Search for fines, recoveries, and disentailing deeds.

Deeds acknowledged by married women before the year 1883.

Search for writs and orders affecting land, and *lis pendens*.

Search for judgments and Crown debts.

(*a*) *Ante*, pp. 206, 554. By stat. 47 & 48 Vict. c. 54, ss. 20—23, 31, provision is made for official search in the Yorkshire registers, and the issue of a certificate of the result of such a search. Like provision as to Middlesex is made by the Rules under the Land Registry (Middlesex Deeds) Act, 1891: W. N. 13th Feb. 1892.

(*b*) *Ante*, pp. 96—99.

(*c*) Established by stat. 1 & 2 Vict. c. 92.

(*d*) *Ante*, pp. 98, 99. As to fines and recoveries in Wales and Cheshire, see stat. 5 & 6 Vict. c. 32.

(*e*) Stat. 42 & 43 Vict. c. 78, s. 5; R. S. C. 1883, Ord. LXI. r. 9. An official search for such deeds may now be directed to be made, and a certificate of the result obtained; Ord. LXI. r. 23; see Wms. Conv. Stat. 273, 274.

(*f*) See *ante*, p. 304 and n. (*e*); Wms. Conv. Stat. 281—285.

(*g*) An official search for such conveyances may be directed to be made and a certificate of the result obtained; see stat. 45 & 46 Vict. c. 39, ss. 2, 7; R. S. C. 1883, Ord. LXI. r. 23; Wms. Conv. Stat. 262, 263, 268, 270, 273, 281—285, 477—479, 483, 486, 490, 491.

(*h*) *Ante*, pp. 266, 287.

(*i*) *Ante*, p. 286.

1900 (*j*) will come into operation, judgments entered up before the 23rd of July, 1860, and debts to the Crown incurred before the 2nd of November, 1865, remain charges on land, if duly registered; and if the vendor or mortgagor, or any former owner might have created such incumbrances, they should be searched for (*k*).

Search for Crown process of execution.

And where liability to the Crown may have been incurred after the 1st of November, 1865, the register of Crown writs or processes of execution should be searched (*l*). But, as we have seen (*m*), after the commencement of the Land Charges Act, 1900, it will be unnecessary to search for judgments, Crown debts, or Crown process of execution.

Search for life annuities.

It is also usual to search the register of life annuities granted (otherwise than by marriage settlement or will) after the 25th of April, 1855 (*n*).

Search for land charges.

On a sale or mortgage of agricultural land, it is desirable to search for land charges affecting the same and registered under the Land Charges Act of 1888 (*o*); and also for land improvement charges not so registered (*p*).

Search in Court Rolls.

On the sale or mortgage of copyholds, the Court Rolls are always searched (*q*).

Search for registration of title.

By inspection of the Index Map at the office of Land Registry it may be ascertained

(*j*) Stat. 63 & 64 Vict. c. 26.

(*k*) *Ante*, pp. 265, 279, 285, 287. It is not necessary to search for judgment or Crown debts against the names of trustees, or of mortgagees, who have been or are to be paid off; *Whitworth* v. *Gaugain*, 1 Ph. 728; *ante*, p. 551.

(*l*) *Ante*, pp. 279, 285.

(*m*) *Ante*, p. 287.

(*n*) *Ante*, p. 418. Life annuities, which may have been charged on the land for money or money's worth prior to the 10th of August, 1854, may generally be discovered by a search amongst the memorials of such annuities; see *ante*, p. 418, n. (*n*). The lands charged, however, are not necessarily mentioned in the memorial. This search must now be made in the Central Office; but at the present time it can rarely be necessary.

(*o*) See *ante*, p. 418.

(*p*) *Ante*, p. 124; as to these searches, see Elphinstone and Clark on Searches, 109 *sq.* By stat. 55 & 56 Vict. c. 57, s. 13, premises within an urban sanitary district may be charged with private street improvement expenses, and the urban authority is to keep a register of such charges. And these provisions may apply to a rural district, if so directed by the Local Government Board. As to such charges, see *Stock* v. *Meakin*, 1900, 1 Ch. 683.

(*q*) Elphinstone and Clark on Searches, 161; 1 Dart, V. & P. 451, 497, 5th ed.; 523, 566, 6th ed.

whether the title to any particular piece of land has been registered under the Land Transfer Acts, 1875 and 1897 (*r*); and this search, together with a search in the list of pending applications, should certainly be made on the sale or mortgage of any land asserted not to have been registered but situate in a district where registration is compulsory (*s*). Lastly, the bankruptcy of any vendor or mortgagor, or his insolvency prior to the Bankruptcy Act, 1861 (*t*), may be discovered by a search in the records of the Bankrupt or Insolvent Courts; and it is the duty of the purchaser's or mortgagee's solicitor to make such search, if he has any reason to believe that the vendor or mortgagor is or has been in embarrassed circumstances (*u*). In such a case, search should also be made for any deed of arrangement, which may affect the land (*v*). Searches are usually confined to the period which has elapsed from the last purchase deed,—the search presumed to have been made on behalf of the former purchaser being generally relied on as a sufficient guarantee against latent incumbrances prior to that time (*w*).

Search for bankruptcy or insolvency:

and for deeds of arrangement.

Practice as to searches.

The bulk of the purchase money is never paid, on a sale of land (*x*), nor is mortgage money usually advanced,

Payment of purchase or mortgage money on conveyance.

(*r*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; Land Transfer Rules, 1898, Nos. 12, 14.

(*s*) *Ante*, pp. 207, 208.

(*t*) *Ante*, pp. 272, 273.

(*u*) *Cooper* v. *Stephenson*, 16 Jur. 424; 21 L. J. Q. B. 292.

(*v*) *Ante*, p. 272.

(*w*) Williams on Real Property, 357, 1st ed.; 465, 13th ed.; Elphinstone and Clark on Searches, 50. 148, 149. As we have seen (*ante*, p. 287, n. (*t*)), in the case of matters, whereof entries are required or allowed by statute to be made in the Central Office, or which may be entered in the registers established by the Land Charges Act of 1888, official searches may be made, and a certificate of the result obtained. And it is enacted that such a certificate shall be conclusive in favour of a purchaser. It appears, however, that such a certificate will merely be conclusive evidence, in favour of a purchaser, that there are no entries against the person named therein *by the description therein applied to him*. Hence private searches may be preferred, as affording a better opportunity for tracing entries against the same person under a different description: see the work last cited (which should be consulted on the subject of searches generally), pp. 166—168.

(*x*) On all sales by auction and many private sales, a deposit of a certain percentage of the pur-

until the title has been investigated in the manner described (*y*), and the necessary searches made. But if all these enquiries have been satisfactorily prosecuted, the transaction is then completed by conveyance of the land on the one hand, and payment of the consideration money on the other. As a rule, a person bound to pay money to another will not be discharged from his liability by payment to the other's solicitor, unless the solicitor be expressly authorized to receive the money (*z*). But by the Conveyancing Act of 1881 (*a*), where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any other authority in that behalf. Formerly it was a rule of equity, that any person paying money or assigning other personal estate to a trustee thereof was bound to see that the same was duly applied pursuant to the trust, unless exempted from that obligation by the intention of the author of the trusts; which intention might be either expressly declared or implied from the nature of the trusts (*b*).

Payment to vendor's or mortgagor's solicitor.

Payment to trustees.

chase money is made, on entering into the contract, as a guarantee for its due performance; see *Howe* v. *Smith*, 27 Ch. D. 89.

(*y*) *Ante*, p. 571.

(*z*) See *Wilkinson* v. *Candlish*, 5 Ex. 91; *Viney* v. *Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon* v. *Roche*, 27 L. J. N. S. Ch. 681; *Ex parte Swinbanks*, 11 Ch. D. 525.

(*a*) Stat. 44 & 45 Vict. c. 41, s. 56; see *King* v. *Smith*, 1900. 2 Ch. 425. Stat. 56 & 57 Vict. c. 53, s. 17, replacing 51 and 52 Vict. c. 59, s. 2 (which altered the law as laid down in *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387), now enables trustees so to authorize their solicitor to receive money due to them; see *Re Hetling and Merton's contract*, 1893, 3 Ch. 269.

(*b*) See Sug. V. & P. 657 *sq.*; Lewin on Trusts, 394 *sq.*, 6th ed.; 519 *sq.*, 10th ed. It was consequently the practice to insert in all instruments creating a trust a clause, called the receipt clause, declaring that the receipt of the trustees should discharge any person paying money to them from the obligation so imposed. This practice was discontinued after the passing of Lord Cranworth's Act; see next note; Davidson, Prev. Conv. Vol. III. Pt. I. p. 226, Pt. II. p. 719, n., 3rd ed.

Trustee's receipt for *money, securities and other personal property*, now a good discharge.

But it is now enacted (*c*) that the receipt in writing of any trustee for any money, securities or other personal property or effects payable, transferable or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

Not only is proof of title required in modern dealings with land (*d*), but a guarantee of indemnity, in case the title should afterwards prove defective, is also taken. This guarantee, however, does not follow the form of the old warranty, which bound the warrantor to give lands of equal value in default of maintaining his title (*e*); but it is contained in certain covenants for title, as they are termed, given by the party conveying the land; for breach of which covenants the remedy is an action for damages (*f*). Unlike the simple clause of warranty in ancient days, modern covenants for title were five and are now four in number. The first covenant was, that the vendor is seised in fee simple; the next, that he has good right to convey the lands; the third, that they shall be quietly enjoyed; the fourth, that they are free from incumbrances; and the last, that the vendor and his heirs will make any further assurance for the conveyance of the premises which may reasonably be required. But during the second quarter of

Covenants for title.

(*c*) Stat. 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36, and applying to trusts created either before or after the commencement of the Act. Also by stat. 22 & 23 Vict. c. 35, s. 23, the receipt of a trustee for any *purchase* or *mortgage money* payable to him is a good discharge, unless a contrary intention be expressly declared by the instrument creating the trusts. Lord Cranworth's Act, stat. 23 & 24 Vict. c. 145, s. 29, provided that trustees' receipts should be good discharges for any *money* payable to them: but this provision applied only in the case of instruments executed after the Act, and was repealed by stat. 44 & 45 Vict. c. 41, s. 71.

(*d*) *Ante*, p. 571.

(*e*) *Ante*, p. 569.

(*f*) Sug. V. & P. 610 *sq.*; *Jenkins* v. *Jones*, 9 Q. B. D. 129; *David* v. *Sabin*, 1893, 1 Ch. 523; *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11.

the present century, the first covenant went out of use, the second being evidently quite sufficient without it. Covenants for title vary in comprehensiveness, according to the circumstances of the case. A vendor is not bound to give absolute covenants for the title to the lands he sells (*g*), but is entitled to limit his responsibility to the acts of those who have been in possession since the last sale of the estate; so that if the land should have been purchased by his father, and so have descended to the vendor, or have been left to him by his father's will, the covenants will extend only to the acts of his father and himself (*h*): but if the vendor should himself have purchased the lands, he will covenant only as to his own acts (*i*), and the purchaser must ascertain by an examination of the previous title, that the vendor purchased what he might properly re-sell. A mortgagor, on the other hand, always gives absolute covenants for title; for those who lend money are accustomed to require every possible security for its repayment. When a sale is made by trustees, who have no beneficial interest in the property themselves, they merely covenant that they have respectively done no act to encumber the premises. If the money is to be paid over to A. or B. or any persons in fixed amounts, the persons who take the money are expected to covenant for the title (*k*); but, if the money belongs to infants or other persons who cannot covenant, or is to be applied in payment of debts or for any similar purpose, the purchaser must rely for the security of the title solely on the accuracy of his own investigation (*l*).

Covenants for title by a vendor.

Covenants for title by a mortgagor.

Covenants by trustees.

On a conveyance of freeholds, the covenants for title are always included in the deed of conveyance: but on

(*g*) *Church* v. *Brown*, 15 Ves. 263. 10 R. R. 74.

(*h*) Sug. V. & P. 574; 1 Dart. V. & P. 616, 617, 6th ed.

(*i*) See next chapter and Appendix (A).

(*k*) Sug. V. & P. 574.

(*l*) Ibid.

the sale or mortgage of copyhold lands these covenants are usually contained in a deed of covenant to surrender, by which the surrender itself is immediately preceded (*m*), the whole being regarded as one transaction (*n*). It is no longer usual, however, to insert in such deeds express covenants for title at length; the present practice is by the use of the proper statutory expressions to incorporate in deeds of conveyance the covenants for title contained in the Conveyancing Act of 1881 (*o*). By virtue of this Act the following covenants are implied, upon conveyances (*p*) made after the year 1881, with the person or persons to whom the conveyance is made (*q*) in the following (amongst other (*r*)) cases:—

(1) *In a conveyance for valuable consideration, other than a mortgage*, the four usual covenants for title (*s*) *by a person who conveys and is expressed to convey as beneficial owner*, limited to the acts of the

(*m*) *Ante*, p. 546. By the Stamp Act 1891, stat. 54 & 55 Vict. c. 39, replacing 33 & 34 Vict. c. 97, such a deed of covenant is now charged with a duty of 10*s.*; and if the *ad valorem* duty on the sale or mortgage is less than that sum, then a duty of equal amount only is payable.

(*n*) *Riddell* v. *Riddell*, 7 Sim. 529.

(*o*) Stat. 44 & 45 Vict. c. 41, s. 7; see also sects. 59 (sub-s. 2), 60 (sub-sec. 2), 64; Wms. Conv. Stat. 74—93, 234, 236, 244.

(*p*) By sect. 7, sub-s. 5, conveyance in this section includes a deed conferring the right to admittance to copyhold or customary land (such as a covenant to surrender the same; *ante*, p. 589), but does not include any other customary assurance, or a demise by way of lease at a rent.

(*q*) The Act annexes the benefit of the covenants so implied to the estate of the implied covenantee, and makes them enforceable by every person, in whom the whole or part of that estate may be vested; sect. 7, sub-s. 6. The covenants so implied may be varied or extended by deed; sect. 7, sub-s. 7.

(*r*) The other cases are these:—(1) *Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys*, the same covenants are implied on the part of the person giving the direction as if he conveyed and were expressed to convey as beneficial owner: sect. 7, sub-s. 2. (2) *Where a wife conveys and is expressed to convey as beneficial owner and the husband also conveys and is expressed to convey as beneficial owner*, besides the covenants implied by the use of these expressions as above, there are implied the same covenants as if the wife conveyed and were expressed to convey by direction of the husband as beneficial owner and also covenants by the husband in the same terms as the covenants implied on the part of the wife: sect. 7, sub-s. 3. See Wms. Conv. Stat. 87—91.

(*s*) *Ante*, p. 588.

person who so conveys, and of any one through whom he derives title otherwise than by purchase for value, not including a conveyance in consideration of marriage (*t*) :

(2) *In a conveyance of leasehold property for valuable consideration, other than a mortgage*, the same covenants *by a person who conveys and is expressed to convey as beneficial owner* as are implied in case (1) (*u*) ; and a further covenant (similarly limited) that the lease is valid, that the rent has been paid, and that the covenants have been performed (*x*) :

(3) *In a conveyance by way of mortgage*, absolute covenants for title *by a person who conveys and is expressed to convey as beneficial owner* (*y*) :

(4) *In a conveyance by way of mortgage of leasehold property*, the same covenants *by a person who conveys and is expressed to convey as beneficial owner* as are implied in case (3) (*z*), and, in addition, an absolute covenant for validity of the lease creating the term for which the land is held, and for indemnity against the rent and covenants of the lease, so long as any money remains on the security of the conveyance (*a*) :

(5) *In a conveyance by way of settlement*, a covenant for further assurance *by a person who conveys and is expressed to convey as settlor* limited to himself, and every person deriving title under him subsequently to that conveyance (*b*) :

(6) *In any conveyance*, a covenant against incumbrances *by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court*, which covenant is to be deemed to extend to every such person's own acts only (*c*).

By these means suitable covenants for title may be incorporated in a deed of conveyance of freeholds or leaseholds upon a sale, mortgage or settlement, or in a deed of covenant to surrender copyholds. But to accomplish this the exact expressions employed in the Act must be used ; otherwise no covenant will be implied (*d*). The use of statutory covenants for title will be illustrated in the next chapter.

Words formerly implying a

Formerly some words used in conveyancing in themselves implied a guarantee of good title. Thus we have

(*t*) Sect. 7, sub-s. 1 (A).
(*u*) An assignment of leaseholds is included in case (1) ; see sect. 2.
(*x*) Sect. 7, sub-s. 1 (B).
(*y*) Sect. 7, sub-s. 1 (C).
(*z*) A mortgage of leaseholds is included in case (3) ; see sect. 2.
(*a*) Sect. 7, sub-s. 1 (D).
(*b*) Sect. 7, sub-s. 1 (E).
(*c*) Sect. 7, sub-s. 1 (F).
(*d*) Sect. 7, sub-s. 4.

guarantee of good title.

Give.

Grant.

Exchange.

Partition.

seen (*e*) that the word *give* implied a personal warranty; and the word *grant* was supposed by some to imply a warranty, unless followed by an express covenant, imposing on the grantor a less liability (*f*). At common law too, an exchange and a partition between coparceners implied a mutual right of re-entry, on the eviction of either of the parties from the lands exchanged or partitioned (*g*). And, by the former Registry Acts for Yorkshire, the words *grant, bargain and sell*, in a deed of *bargain and sale* of an estate in fee simple, inrolled in the Registry Office, implied covenants for the quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof by the same parties, unless restrained by express words (*h*). The word *grant*, by virtue of some other Acts of Parliament, also implies covenants for the title (*i*). But the Real Property Act, 1845, now provides that an exchange or a partition of any tenements or hereditaments made by deed shall not imply any condition in law; and that the word *give* or the word *grant* in a deed shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word *give* or the word *grant* may by force of any Act of Parliament imply a covenant (*k*). The mere conveyance of a freehold estate, therefore, does not now imply any covenant for title (*l*). But if a man grant a lease of land for a term of years, using the word *demise* or equivalent expressions, there will be implied on his part a covenant for quiet enjoyment of

Grant, bargain and sell, in bargain and sale of lands in Yorkshire.

Real Property Act, 1845.

Covenant implied in lease.

(*e*) *Ante*, p. 569.

(*f*) See Co. Litt. 384 a, n. (1).

(*g*) *Bustard's case*, 4 Rep. 121 a.

(*h*) Stat. 6 Anne, c. 62 (c. 35 in Ruffhead), ss. 30, 34; 8 Geo. II. c. 6, s. 35.

(*i*) As in conveyances *by* companies under the Lands Clauses Consolidation Act, 1845, stat. 8 & 9 Vict. c. 18, s. 132; and in conveyances to the Governors of Queen Anne's Bounty, stat. 1 & 2 Vict. c. 20, s. 22.

(*k*) Stat. 8 & 9 Vict. c. 106, s. 4, repealing 7 & 8 Vict. c. 76, s. 6. The writer is not aware of any Act of Parliament by force of which the word *give* implies a covenant.

(*l*) See Co. Litt. 384 a, n. (1).

the land according to the lease so long as the lessor or any one deriving title from him shall have any estate in the land (*m*). So that if the lessor's estate should come to an end during the term, without any act or default of his own, as by the death of a tenant for life, the lessee would be without remedy upon such an implied covenant (*n*). Though if the lessor had no estate at all in the land comprised in the lease, which took effect merely by estoppel (*o*), the lessee might then sue on the implied covenant in case of his eviction or failure to enter (*p*). If, however, the lease should contain an express covenant by the lessor for quiet enjoyment, limited to his own acts only, such express covenant, showing clearly what is intended, will nullify the covenant, which would otherwise be implied in law from the word *demise* or other words of lease (*q*). As has been before mentioned (*r*), a covenant so limited is all that an intending lessee can require to be inserted in a lease, without special stipulation. This covenant must still be set out at length, as no covenants for title are implied by the Conveyancing Act in a demise at a rent, even though the statutory expressions be used (*s*).

(*m*) *Spencer's case*, 5 Rep. 17 a; Shepp. Touch. 160, 165, 178; Bac. Abr. Covenant (B); *Mostyn* v. *The West Mostyn Coal & Iron Co.*, 1 C. P. D. 145; see *Baynes* v. *Lloyd*, 1895, 2 Q. B. 610.

(*n*) *Adams* v. *Gibney*, 6 Bing. 656; *Baynes* v. *Lloyd*, *ubi sup.*

(*o*) *Ante*, p. 494.

(*p*) *Holder* v. *Taylor*, Hob. 12; *Style* v. *Hearing*, Cro. Jac. 73.

(*q*) *Noke's case*, 4 Rep. 80 b. As to the effect of such a covenant, see *Kelly* v. *Rogers*, 1892, 1 Q. B. 910; *Cohen* v. *Tannar*, 1900, 2 Q. B. 609.

(*r*) *Ante*, p. 496, n. (*l*).

(*s*) *Ante*, p. 590, n. (*p*).

PART VI.

OF THE PRESENT FORM OF A CONVEYANCE.

THE reader is now in a position to understand all the clauses usual in an ordinary deed of conveyance upon sale. Since the commencement of the Conveyancing Act of 1881 (*a*), the usual form of such a deed has undergone a great change, several clauses, which were previously inserted at length, being now omitted in reliance on provisions of that Act. But it is impossible to understand the changes in practice, which the Act has caused, without some acquaintance with the kind of deed previously in use. We will therefore begin by considering the form of the conveyance requisite before the year 1882 to complete a simple transaction of sale of a piece of land by a vendor, who purchased it himself (*b*), and is entitled thereto for an unincumbered estate in fee simple. For convenience of examination each clause is printed in a separate paragraph.

Date. THIS INDENTURE (*c*) made the 31st day of December, 1881

Parties. Between A. B. of Cheapside in the city of London esquire of the one part and C. D. of Lincoln's Inn in the county of Middlesex esquire of the other part

Recital. WHEREAS the said A. B. has agreed with the said C. D. for the sale to him of the fee simple in possession free from incumbrances of the hereditaments hereinafter expressed to be hereby granted

Testatum. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration (*d*) of the sum of one thousand pounds upon the execution of these presents paid by the said C. D. to the said

Consideration.

(*a*) Stat. 44 & 45 Vict. c. 41, which commenced immediately after the 31st Dec., 1881.

(*b*) *Ante*, p. 589.

(*c*) *Ante*, p. 152.

(*d*) *Ante*, p. 203.

A. B. (the receipt of which sum the said A. B. doth hereby acknowledge) the said A. B. doth hereby grant (*e*) unto the said C. D. and his heirs — Receipt. Operative words.

ALL THAT messuage or tenement [*insert description of the property*] — Parcels.

TOGETHER WITH all buildings fixtures lights commons fences ways waters watercourses easements and appurtenances whatsoever to the said hereditaments or any of them appertaining or with the same or any of them now or heretofore enjoyed or reputed as part thereof or appurtenant thereto (*f*) — General words.

AND ALL THE ESTATE right title interest claim and demand of the said A. B. in to and upon the said premises — Estate clause.

TO HAVE AND TO HOLD the said premises hereinbefore expressed to be hereby granted UNTO AND TO THE USE (*g*) of the said C. D. his heirs and assigns for ever (*h*) — Habendum. To the use of the purchaser. In fee simple.

AND THE SAID A. B. doth hereby for himself his heirs executors and administrators covenant with the said C. D. his heirs and assigns (*i*) — Covenants for title:

THAT notwithstanding anything by him the said A. B. (*k*) done omitted or knowingly suffered he now hath power to grant the said premises hereinbefore expressed to be hereby granted to the use of the said C. D. his heirs and assigns — 1. For right to convey.

AND THAT the same premises shall at all times remain and be to the use of the said C. D. his heirs and assigns and be quietly entered into and upon and held and enjoyed and the rents and profits thereof received by him and them accordingly without any interruption or disturbance by the said A. B. or any person claiming through or in trust for him — 2. For quiet enjoyment.

AND THAT (*l*) free and discharged from or otherwise by him the said A. B. his heirs executors or administrators sufficiently indemnified against all estates incumbrances claims and demands created occasioned or made by him or any person claiming through or in trust for him — 3. Free from incumbrances.

AND FURTHER that he and every person having or claiming any estate or interest in the said premises through or in trust for him will at all times at the cost of the person or persons requiring the same execute and do every such assurance and thing for the further or more perfectly assuring all or any of the said premises to the use of the said C. D. his heirs and assigns as by him or them shall be reasonably required. — 4. For further assurance.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(*e*) *Ante*, pp. 201, 209.
(*f*) *Ante*, p. 415.
(*g*) *Ante*, p. 203.
(*h*) *Ante*, pp. 145—147, 202. As to omitting any declaration to bar dower, see p. 319.
(*i*) *Ante*, p. 588.
(*k*) A. B. covenants against his own acts only. *Ante*, p. 589.
(*l*) The word *that* is here a pronoun.

Two witnesses desirable.

To the foot of the deed are appended the seals and signatures of the parties (*m*); and on the back is indorsed an attestation by the witnesses, of whom it is very desirable that there should be two, though the deed would not be void even without any (*n*). And before 1882 it was the practice also to indorse on the back of the deed a further receipt for the purchase-money (*o*).

Stamps.

On the face of the deed are impressed the proper stamps (*p*). And if the land conveyed should be situate

Indorsement of memorandum of registration.

in Middlesex or Yorkshire, a memorandum of the exact time of registration of a memorial of the conveyance (*q*) is indorsed thereon, with the proper reference to the

(*m*) *Ante*, p. 154.
(*n*) 2 Black. Comm. 307, 378.
(*o*) This practice is of comparatively modern date. See 2 Atk. 478; 3 Atk. 112; 2 Sand. Uses, 305, n. A. (118, n., 5th ed.); 3 Prest. Abst. 15.

(*p*) Unstamped or insufficiently stamped instruments shall not, except in criminal proceedings, be given in evidence or be available for any purpose whatever: but such instruments may, as a rule, be received in evidence on payment of the proper duty and the appointed penalty: see stat. 54 & 55 Vict. c. 39, ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29; *Re Coolgardie Goldfields, Ld.*, 1900. 1 Ch. 475. Conveyances on sale are now subject to *ad valorem* stamps of one-half per cent., or five shillings per fifty pounds on the amount or value of the consideration for the sale, according to the table below.

Where the amount or value of the consideration for the sale does not exceed £5 ... ... £0 0 6

Exceeds	£5	and does not exceed	£10	0 1 0
,,	10	,,	15	0 1 6
,,	15	,,	20	0 2 0
,,	20	,,	25	0 2 6
,,	25	,,	50	0 5 0
,,	50	,,	75	0 7 6
,,	75	,,	100	0 10 0
,,	100	,,	125	0 12 6
,,	125	,,	150	0 15 0
,,	150	,,	175	0 17 6
,,	175	,,	200	1 0 0
,,	200	,,	225	1 2 6
,,	225	,,	250	1 5 0
,,	250	,,	275	1 7 6
,,	275	,,	300	1 10 0
,,	300			

For every £50, and also for any fractional part of £50, of such amount or value ... 0 5 0

See stat. 54 & 55 Vict. c. 39 (The Stamp Act, 1891), ss. 1, 54—61, and First Schedule, replacing 33 & 34 Vict. c. 97; 63 Vict. c. 7, s. 10.

(*q*) *Ante*, p. 206.

book and page of the register, where the entry is to be found.

From the specimen before him, the reader will be struck with the stiff and formal style which characterises legal instruments; but the formality to be found in every properly drawn deed has the advantage, that the reader who is acquainted with the usual order knows at once where to find any particular portion of the contents; and in matters of intricacy, which must frequently occur, this facility of reference is of incalculable value. The framework of every deed consists but of one, two, or three simple sentences, according to the number of times that the *testatum*, or witnessing part, "Now this Indenture witnesseth," is repeated. This *testatum* is always written in large letters; and, although there is no limit to its repetition (if circumstances should require it), yet in the majority of cases, it occurs but once or twice at most. In the example above given, it will be seen that the sentence on which the deed is framed is as follows:—"This Indenture, made on "such a day between such parties, witnesseth, that for "so much money A. B. doth grant certain premises "unto and to the use of C. D. and his heirs." After the names of the parties have been given, an interruption occurs for the purpose of introducing the recital; and when the whole of the introductory circumstances have been mentioned, the thread is resumed, and the deed proceeds, "Now this Indenture witnesseth." The receipt for the purchase-money is again a parenthesis; and soon after comes the description of the property, which further impedes the progress of the sentence, till it is taken up in the *habendum*, "To have and to hold," from which it uninterruptedly proceeds to the end. The contents of deeds, embracing as they do all manner of transactions between man and man, must necessarily be infinitely varied, and a simple conveyance,

Formal style of legal instruments.

Testatum.

Habendum.

such as that we have given, is rare, compared with the number of those in which special circumstances occur. But in all deeds, as nearly as possible, the same order is preserved. The names of all the parties are invariably placed at the beginning: then follow recitals of facts relevant to the matter in hand; then a preliminary recital, stating shortly what is to be done; then the *testatum*, containing the *operative words* of the deed, or the words which affect the transaction, of which the deed is the witness or evidence; after this, if the deed relate to property, come the *parcels* or description of the property, either at large, or by reference to some deed already recited; then the *habendum* showing the estate to be holden; then the *uses* and *trusts*, if any; and, lastly, such qualifying provisoes and covenants, as may be required by the special circumstances of the case. Throughout all this, not a single stop is to be found, and the sentences are so framed as to be independent of their aid; for no one would wish the title to his estates to depend on the insertion of a comma or semicolon. The commencement of sentences, and now and then some few important words, which serve as landmarks, are rendered conspicuous by capitals; by the aid of these the practised eye at once collects the sense; whilst, at the same time, the absence of stops renders it next to impossible materially to alter the meaning of a deed without the forgery being discovered.

Parties.

Recitals.

Operative words.

Parcels.

Habendum.

Uses and trusts.

Covenants.

No stops.

If the reader will turn to Appendix (A), he will observe that the frame of the precedent given above is the same as that of the old release; although in the former the clauses conveying the reversion, &c., and the title-deeds are omitted as unnecessary (*r*), as well as the covenant that the vendor is seised in fee (*s*), and

(*r*) Title-deeds pass on a conveyance of the land, to which they relate, without being expressly mentioned; *Harrington* v. *Price*, 3 B. & Ad. 170.

(*s*) *Ante*, p. 588.

in the latter the conveyance is made to the old uses to bar dower (*t*), and not simply to the purchaser in fee. But though the chief clauses of the modern deed of grant are in substance the same as those of the earlier release, it will be observed that in the above precedent no attempt is made to rival its elaborate superfluity of expression. The extreme luxuriance of language by which legal instruments were distinguished (*u*) was in a great measure the outcome of the faulty system of remuneration formerly employed for conveyancing work. The labour of a lawyer is very different from that of a copyist or printer; it consists first and chiefly in acquiring a minute acquaintance with the principles of the law, then in obtaining a knowledge of the facts of any particular case which may be brought before him, and lastly, in practically applying to such case the principles he has previously learnt. But, for the last and least of these items alone did conveyancers obtain any direct remuneration; for deeds were paid for by the length, like printing or copying, without any regard to the principles they involved, or to the intricacy or importance of the facts to which they might relate (*x*); and, more than this, the rate of payment was fixed so low, that no man of education could afford for the sake of it, first to ascertain what sort of instrument the circumstances might require, and then to draw a deed containing the full measure of ideas of which

(*t*) *Ante*, p. 380.

(*u*) The extravagant verbosity of conveyancing forms appears to date from the latter part of the sixteenth century; see the books mentioned in Davidson's Prec. Conv. Vol. I. pp. 7—12, 5th ed.

(*x*) By stat. 6 & 7 Vict. c. 73. s. 37, the charges of a solicitor for business relating entirely to conveyancing were rendered liable to *taxation* or reduction to the established scale, which was then regulated only by length. Previously to this statute, the bill of a solicitor relating to conveyancing was not taxable, unless part of the bill was for business transacted in some Court of law or equity; Beames on Costs, 176, 177, 2nd ed. (1840). But although conveyancing bills were not strictly taxable, they were always drawn up on the same principle of payment by length, which pervaded the other branches of the law.

words are capable (*y*). The consequence of this false economy on the part of the public was that certain well-known and long-established lengthy forms, full of synonyms and expletives, were current among lawyers as *common forms*, and, by the aid of these, ideas were diluted to the proper remunerating strength; not that lawyers actually inserted nonsense simply for the sake of increasing their fees; but words, sometimes unnecessary in any case, sometimes only in the particular case in which they were engaged, were suffered to remain, sanctioned by the authority of time and usage. The proper amount of verbiage to a common form became well established and understood; and whilst any attempt to exceed it was looked on as disgraceful, for a long time it was not materially diminished. In the last century, however, the art of conveyancing did not escape the influence of the spirit of reform, which gave rise to the real property legislation of 1833 (*z*), 1845 (*a*), and 1859-60 (*b*). The exuberant verbiage of the old common forms was gradually weeded out; and after the introduction of the conveyance of land by simple grant (*c*), there was an increasing tendency on the part of conveyancers to eradicate superfluous words from their precedents. The old system of remuneration for conveyancing work remained substantially the same until 1881 (*d*). Since that year the remuneration of solicitors for conveyancing and other non-contentious business has been regulated upon new principles by the

Common forms.

Solicitors' Remuneration Act, 1881, and order thereunder.

(*y*) When conveyancing bills became taxable, the payment to a solicitor for drawing a deed was fixed at one shilling for every seventy-two words, denominated a *folio;* Richards's Book of Costs (1844), pp. 408—411; and the fees of counsel, though paid in guineas, averaged about the same.

(*z*) *Ante*, pp. 98, 99, 221, 303, 318, 561.

(*a*) *Ante*, pp. 201, 362, 524.

(*b*) *Ante*, pp. 502, 503, 541.

(*c*) *Ante*, p. 291.

(*d*) By stat. 33 & 34 Vict. c. 28, ss. 4—15, 18, the remuneration of solicitors was first authorized to be fixed by agreement between themselves and their clients, and the officers taxing solicitors' costs were permitted to have regard to the skill, labour and responsibility involved.

general order made under the Solicitors' Remuneration Act, 1881 (*o*). Under the influence of the present system of remuneration and of the changes in practice caused by the operation of the Conveyancing Act of 1881, all unnecessary clauses and expressions are now generally excluded from deeds. It must not be supposed, however, that legal instruments are now drawn without regard to precedent, or are altogether destitute of lengthy clauses. When parties desire to provide exhaustively for several possible events, as often occurs in the case of settlements and wills, it is rarely possible to be concise without the risk of inaccuracy. In such cases, the clauses inserted are frequently based upon the old common forms, the best of which, though prolix, were marvellously accurate. And in all drafting due regard should always be had to the established forms, which have stood the test of long usage,

(*o*) Stat. 44 & 45 Vict. c. 44, ss. 1—7. By this order the remuneration of solicitors in respect of business connected with sales, purchases and mortgages completed and with leases and agreements for leases (other than mining or building leases), and conveyances reserving rent, or agreements for the same, when the transaction shall have been completed, is to be that prescribed in Schedule I. to the order. In respect of all other conveyancing and non-contentious business the remuneration* is to be regulated according to the previous system as altered by Schedule II. Schedule I. contains scales of charges adjusted upon the principle of a commission or percentage upon the amount of the purchase or mortgage money, or the rent reserved. Schedule II. prescribes such fees for instructions for deeds, wills, and other documents as may be fair and reasonable, raises the allowance for drawing such documents to two shillings per folio, and specifies certain other charges. The charges specified in Schedule II. may be increased or diminished in extraordinary cases for special reasons. In all cases to which the scales prescribed in Schedule I. apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the previous system as altered by Schedule II.; but, if no such election is made, his remuneration will be according to the scale prescribed by Schedule I.; see *Hester* v. *Hester*, 34 Ch. D. 607. Under the same Act of 1881 (sect. 8), it is competent for a solicitor and his client to enter into an agreement, which must be in writing signed by the person to be bound thereby, or by his agent in that behalf, for the remuneration of the solicitor, to such amount and in such manner as they may think fit, for any business to which the Act relates.

*Remuneration by commission or percentage.

Agreement as to remuneration.

and to which generations of conveyancers have contributed their skill and learning.

Conveyance made after the 31st December, 1881.

But to return to our practical illustration of the conveyancer's craft;—Let us now suppose that a simple transaction of sale of land exactly similar to those, to which the deeds given above and in Appendix (A) relate, is to be completed at the present time. In drawing our conveyance, we may then rely on the following provisions of the Conveyancing Act of 1881 (*f*), which apply only to conveyances made after the 31st of December, 1881 (*g*):

Conveyance of land passes advantages in the nature of easements enjoyed with the land at the time of conveyance.

(Section 6, sub-section 1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof (*h*).

(Section 6, sub-section 2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*i*).

Conveyance of land passes all the estate and interest of the party conveying.

(Section 63, sub-section 1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same (*k*).

Sections 6 and 63 apply only if and as far as a contrary intention

(*f*) Stat. 44 & 45 Vict. c. 41.
(*g*) Sects. 6 (sub-s. 6), 7 (sub-s. 8), 63 (sub-s. 3).
(*h*) See Wms. Conv. Stats. 60—69, 73.
(*i*) See Wms. Conv. Stats. 70, 73.
(*k*) See Wms. Conv. Stats. 242—244.

is not expressed in the conveyance, and have effect subject to the terms of the conveyance and to the provisions therein contained (*l*).

Covenants by party conveying implied in a conveyance in certain cases.

(Section 7, sub-section 1.) In a conveyance there shall, *in the several cases in this section mentioned*, be deemed to be included, and there shall *in those several cases*, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person [or by each person] who conveys, as far as regards the subject-matter or share of subject-matter *expressed to be conveyed by him*, with the person, if one, to whom the conveyance is made, [or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common], that is to say :

Case in which are implied covenants—

(A) *In a conveyance for valuable consideration, other than a mortgage*, the following covenant *by a person who conveys and is expressed to convey as beneficial owner* (namely) (*m*) :

for right to convey ;

That, notwithstanding anything by the person who so conveys, [or any one through whom he derives title, otherwise than by purchase for value,] made, done, executed or omitted, or knowingly suffered, the person who so conveys, has, [with the concurrence of every other person, if any, conveying by his direction,] full power to convey the subject-matter expressed to be conveyed, [subject as, if so expressed, and] in the manner in which, it is expressed to be conveyed ;

for quiet enjoyment :

and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person [conveying by his direction, or] rightfully claiming or to claim by, through, under or in trust for the person who so conveys, [or any person conveying by his direction, or by, through or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value] ;

free from incumbrances :

and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims and demands [other than those subject to which the conveyance is expressly made,] as either before or after the date of the conveyance have been or shall be made, occasioned or suffered by that person [or by any person conveying by his direction,] or by any person rightfully claiming by, through, under,

(*l*) Sects. 6 (sub-s. 4), 63 (sub-s. 2).

(*m*) For covenants implied in other cases, see *ante*, pp. 590, 591.

or in trust for the person who so conveys, [or by, through or under any person conveying by his direction, or by, through or under any one through whom the person who so conveys derives title, otherwise than by purchase for value] ;

and for further assurance.

and further, that the person who so conveys, [and any person conveying by his direction,] and every other person having, or rightfully claiming any estate or interest in the subject-matter of conveyance, [other than an estate or interest subject whereto the conveyance is expressly made,] by, through, under, or in trust for the person who so conveys, [or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title otherwise than by purchase by value,] will from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, [subject as, if so expressed, and] in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :
(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) (*n*).

In considering the above enactments, regard must be had to the following provisions of the interpretation clause of the Act :

Interpretation of terms.

Section 2 (ii.). Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land :

(v.) Conveyance, unless a contrary intention appears (*o*), includes assignment, appointment, lease, settlement or other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property ; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance.

Reason for use of *general words*.

The reader will remember that, before the 6th section of the above Act came into operation, it was unnecessary on a conveyance of land expressly to grant rights

(*n*) See Wms. Conv. Stats. 74—82. The words enclosed within brackets [ ] are those which are not material to the conveyance we are about to consider.

(*o*) See sect. 7, sub-s. 5, *ante*, p. 590, n. (*p*).

legally appurtenant thereto, although the practice was to include such rights in the *general words* (*p*); and that the only real use of *general words* in a conveyance was to grant, as rights or easements, advantages used in connection with the land conveyed as a matter of fact, without being rights legally appurtenant thereto (*q*). For example, suppose that a man has two plots of land, plot A. and plot B., and is accustomed to use for the benefit of plot A. an artificial watercourse carried over plot B., or a road over plot B. These advantages cannot be rights or easements appurtenant to plot A., for they are exercised over plot B.: and no man can have an easement over his own land. But if plot A. were to be sold alone and conveyed to a purchaser "together with all watercourses, ways and advantages therewith used and enjoyed," these words would operate to grant, as rights or easements, the advantages, in the nature of easements, at the time of conveyance as a matter of fact used over plot B. for the benefit of plot A., although the same never previously existed as of right or as legal easements (*r*). After removing from the 6th section of the Conveyancing Act all words, which add nothing to the law (*s*), we find this fact remaining, that by virtue of the Act a conveyance of land now operates to convey all advantages *enjoyed with* the land at the time of conveyance. Having regard to this fact and to the established effect of similar expressions in the case of the old general words, it is considered that the object formerly sought to be effected by the insertion of *general words* in a conveyance, will now be attained by the operation of the enactment in question (*t*). It will be observed that the above section only operates to convey advantages enjoyed

(*p*) See *ante*, p. 415.

(*q*) *Ante*, p. 415; see Wms. Conv. Stats. 65; Williams on Commons, 168—170.

(*r*) *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616; see Wms. Conv. Stats. 65; Williams on Commons, 315—319, 323.

(*s*) See Wms. Conv. Stats. 61 *sq.*

(*t*) See *Broomfield* v. *Williams*, 1897, 1 Ch. 602.

with the land conveyed *at the time of conveyance*. Apparently it would not extend to grant, as rights, advantages enjoyed with the land conveyed at some previous time, but not proved to have been so enjoyed at the time of conveyance (*u*).

Estate clause.

The *estate clause* (*x*) was a relict of the old release, and was much more appropriate to the conveyance of land by lease and release than to a direct grant (*y*). It was nevertheless the practice, after the introduction of conveyance by grant, to insert an estate clause in almost every instrument of alienation, where the entire interest of the conveying parties was transferred, on the alleged ground, that it was necessary to pass any outstanding particular estate or interest which might happen to be vested in any of the conveying parties, distinct from the estate or interest which such party purported to convey. It was admitted, however, that no such ground did exist, and that the clause was wholly unnecessary (*z*). Indeed, it was practically without effect; for it was held to be subservient to the intention of the parties as gathered from the terms of the conveyance (*a*). The enactment of the 63rd section of the Conveyancing Act (*b*) has removed every semblance of necessity for the use of an estate clause, which has at last been abandoned in practice. As the application of this section is declared to be subject to the intention of the parties as expressed in the conveyance (*c*), it does not appear necessary expressly to exclude its operation in conveyances, such as leases (*d*), under which the whole estate of the conveying party is *not* intended to pass.

Reason for use of *estate clause*.

(*u*) See Wms. Conv. Stats. 68, 69.
(*x*) *Ante*, p. 595.
(*y*) *Ante*, pp. 195—201.
(*z*) Davidson's Prec. Conv. vol. i. p. 94, 4th ed.
(*a*) *Hunt* v. *Remnant*, 9 Ex. 635; *Rooper* v. *Harrison*, 2 K. & J. 113; *Neame* v. *Moorsom*, L. R. 3 Eq. 91; *Francis* v. *Minton*, L. R. 2 C. P. 543.
(*b*) *Ante*, p. 602.
(*c*) Stat. 44 & 45 Vict. c. 41, s. 63, sub-s. 2; *ante*, p. 602.
(*d*) See sect. 2 (v.): *ante*, p. 604.

Statutory covenants for title.

We now come to consider the incorporation into our conveyance of the statutory covenants for title. According to our supposition, A. B., the vendor, purchased himself the land he is about to convey. He will, therefore, covenant as to his own acts only (*e*). If we turn to section 7, sub-section 1 (A), of the Conveyancing Act, 1881 (*f*), which is set out above (*g*), we may extract therefrom covenants for title suited to our present requirements. As this enactment is contained in a very intricate sentence, so much of it as is unnecessary for our present purpose has been enclosed within brackets. The words enclosed within brackets do not apply to the transaction we are now considering for the following reasons:— Our conveyance is to be made by one person only to one person only, and not to joint tenants or tenants in common; A. B., the person conveying, purchased the land himself, and, therefore, he does not "derive title through any one otherwise than by purchase for value;" there is no one concurring in the conveyance by the direction of A. B.; and the conveyance is not expressly made subject to any estate, interest or incumbrance. If the above enactment be read straight through, leaving out the words within brackets, its provisions will be found to correspond with the terms of the covenants for title in the form of conveyance given above (*h*). The conditions to be fulfilled in order that the required covenants may be "deemed to be included" in our conveyance, and implied by law upon the execution thereof, appear to be (1) that the conveyance must be a conveyance for valuable consideration other than a mortgage (*i*), and (2) that the person intended to be bound by the implied covenants must convey and be expressed to

(*e*) *Ante*, pp. 589, 595.
(*f*) Stat. 44 & 45 Vict. c. 41.
(*g*) *Ante*, p. 603.
(*h*) *Ante*, p. 595.
(*i*) Different covenants are implied by the use of the words *as beneficial owner* in different conveyances; *e.g.*, in a mortgage absolute covenants for title are thereby implied. See sect. 7, sub-sect. 1 (A), (B), (C), (D): *ante*, pp. 590, 591.

convey as beneficial owner (*k*). The statutory covenants for title are, however, expressed in language so complicated and ungainly, that the draftsman may well hesitate to adopt them. Indeed beside the involved utterance of the statute, the old common form of covenants for title (*l*) appears lucid and mellifluous, and the later form (*m*) terse. But if the required guarantee is substantially furnished by the incorporation of the statutory covenants, as appears to be the case, the convenience of reducing the length of the deed may be allowed to prevail over the objection to their form. We will therefore rely upon the statute for the covenants for title, taking care to use the proper statutory words, without which the necessary covenants by the vendor would not be implied (*n*). Our conveyance will then take the following form, the nature of the transaction being indicated in the *Testatum* instead of by recital :—

Date. THIS INDENTURE made the first day of January 1882

Parties. BETWEEN A. B. of Cheapside in the City of London Esquire of the one part and C. D. of Lincoln's Inn in the County of Middlesex Esquire of the other part

Testatum. Consideration. Nature of transaction. Receipt. WITNESSETH that in consideration (*o*) of the sum of one thousand pounds now paid by the said C. D. to the said A. B. for the purchase of the unincumbered fee simple in possession of the hereditaments hereinafter described (the receipt of which sum the said A. B. doth hereby acknowledge) the said A. B. doth hereby grant (*p*) *as beneficial owner* (*q*) unto the said C. D.

Operative words. Parcels. ALL THAT messuage or tenement [*insert description of the property*]

Habendum. TO HAVE AND TO HOLD the same premises unto and to the use (*r*) of the said C. D. in fee simple (*s*)

IN WITNESS, &c. (*t*).

Receipt. It is no longer usual to indorse a receipt for the consideration upon a deed ; for it is provided by the

(*k*) Sect. 7, sub-sects. 1 (A). 4 : *ante*, pp. 590, 691.
(*l*) See Appendix (A).
(*m*) *Ante*, p. 595.
(*n*) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 4 ; *ante*, p. 590.
(*o*) *Ante*, p. 203.
(*p*) *Ante*, pp. 201, 209.
(*q*) *Ante*, pp. 590, 607.
(*r*) *Ante*, p. 204.
(*s*) *Ante*, p. 202.
(*t*) *Ante*, p. 595.

Conveyancing Act of 1881 (*u*) that a receipt for consideration money or securities in the body of a deed executed after the year 1881 shall be a sufficient discharge, and that such a receipt, *or* an indorsed receipt, shall, in favour of a subsequent purchaser, be sufficient evidence of the payment or giving of the whole amount of the consideration.

The above form of conveyance is certainly shorter than that previously given (*x*); and similar forms are now generally adopted in practice. But it can hardly be said that the rights and obligations of the parties to a conveyance may be determined with increased accuracy or simplicity by a deed relying on the provisions of the Conveyancing and Law of Property Act, 1881 (*y*). The student, when he proceeds to practise drafting, should never forget that a deed is not an end in itself, but is only a means for ascertaining the rights and obligations of the parties thereto. His object should be to define those rights and obligations clearly and accurately, rather than briefly or even concisely. It is of course unnecessary that he should express what is clearly implied by law; but not the least important part of his task is to satisfy himself that the law clearly defines those rights and obligations for which he omits to provide.

It is beyond the scope of the present work to enter upon a discussion of the forms now generally used in conveyances more complicated than the above. But as a mortgage of lands has formed the subject of a previous chapter (*z*), and reference has been frequently made to the settlement of lands on members of a family successively for life and in tail (*a*), two more precedents are

(*u*) Stat. 44 & 45 Vict. c. 41, ss. 54, 55; see Wms. Conv. Stats. 227—230. The absence of an indorsed receipt was formerly regarded as a suspicious circumstance.

(*x*) *Ante*, p. 594.

(*y*) Stat. 44 & 45 Vict. c. 41.

(*z*) *Ante*, p. 527.

(*a*) *Ante*, pp. 100, 112, 117, 351, 382, 385, 400, 401, 419.

appended to enable the student to see how these transactions are carried out in practice. The notes and the references given therein will sufficiently explain the various clauses contained in the deeds. The outline only is inserted of some of the provisions of the settlement.

1. Mortgage of Freehold Lands to Trustees (*b*).

Date. Parties.

THIS INDENTURE made the 15th day of January 1901 BETWEEN A. B. of [*insert description*] hereinafter referred to as "the mortgagor" which expression shall except where repugnant to the context include his heirs executors administrators and assigns (*c*) of the one part and C. D. of [*insert description*] and E. F. of [*insert description*] hereinafter referred to as "the mortgagees" which expression shall except where repugnant to the context include the survivor of them and the heirs executors or administrators of such survivor and their or his assigns (*c*) of the other part

Recital of mortgagor's seisin.

WHEREAS the mortgagor is seised of the hereditaments hereinafter described for an estate in fee simple free from incumbrances (*d*)

Recital of agreement for loan.

AND WHEREAS the mortgagees have agreed to lend to the mortgagor the sum of 4,000*l.* upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing

First testatum: covenant to pay mortgage money.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration (*e*) of the sum of 4,000*l.* upon the

(*b*) *Ante*, p. 550.

(*c*) Interpretation clauses of this kind save much subsequent repetition.

(*d*) If it should happen that the mortgagor has not at the time of this deed the legal estate in the lands mortgaged (as if they were already in mortgage), but should afterwards obtain it, the above precise recital of his seisin would take effect by estoppel to pass the same legal estate, without any further conveyance, to the grantees. But the grant alone, without such recital, would not have this effect, being an innocent conveyance: *ante*, p. 209; cf. p. 494. Nor would an ambiguous recital not precisely averring the mortgagor's legal seisin have the same effect; for instance, a recital that he was seised of or entitled to the lands, for he might well be entitled in equity but not at law. And no such estoppel would arise from the fact that the mortgagor enters into covenants for title. See *Bensley* v. *Burden*, 2 S. & S. 519, 8 L. J. Ch 85, as to which note that, as title is all that can be alleged of an estate in remainder, a recital that one is entitled to lands in remainder after a life estate may take effect by estoppel; *Right* d. *Jeffrys* v. *Bucknell*, 2 B. & Ad. 278; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance, &c., Co.* v. *Liberator, &c., Society*, 10 Ch. D. 15; *Onward, &c., Society* v. *Smithson*, 1893, 1 Ch. 1.

(*e*) *Ante*, p. 203.

execution of these presents paid to the mortgagor by the mortgagees out of and as money belonging to them on a joint account (*f*) (the receipt of which sum the mortgagor doth hereby acknowledge) (*g*) the mortgagor doth hereby covenant with the mortgagees to pay to the mortgagees the sum of 4,000*l.* on the 15th day of July 1901 with interest for the same in the meantime at the rate of 4*l.* per cent. per annum (*h*)

Receipt.

AND IF AND SO LONG AS any principal money shall remain due upon the security of these presents after the 15th day of July 1901 to pay to the mortgagees interest for the same at the rate aforesaid by equal half-yearly payments on every 15th day of January and 15th day of July

Covenant to pay interest after default.

AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the mortgagor doth hereby grant (*i*) AS BENEFICIAL OWNER (*k*) unto the mortgagees

2nd testatum: grant of land.

Operative words.

ALL THAT (*insert description of property*)

Parcels.

TO HAVE AND TO HOLD the same premises unto and to the use of (*l*) the mortgagees in fee simple (*m*) subject to the proviso for redemption hereinafter contained

Habendum.

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that if the mortgagor shall on the 15th day of July 1901 pay to the mortgagees the sum of 4,000*l.* with interest for the same in the meantime at the rate of 4*l.* per cent. per annum then the mortgagees shall at any time thereafter upon the request and at the cost of the mortgagor reconvey the said premises hereby assured to the use of the mortgagor in fee simple or as the mortgagor shall direct (*n*)

Proviso for redemption.

AND THE MORTGAGOR doth hereby covenant with the mortgagees to keep all the messuages and buildings now existing or hereafter to be erected upon the hereditaments hereby assured insured against loss or damage by fire in the sum of —*l.* (*o*) at the least so long as any money shall remain upon the security of these presents and duly and punctually to pay all premiums and sums of money necessary for such purposes and to produce the policy or policies of such insurance and the receipt for every such payment to the mortgagees at any time on demand (*p*)

Covenant to insure against fire.

AND IT IS HEREBY AGREED that the power of insurance given by law to a mortgagee (*q*) shall be exercisable by the mortgagees in the

Provision as to insurance by mortgagees.

(*f*) *Ante*, p. 551.
(*g*) *Ante*, p. 609.
(*h*) *Ante*, p. 527.
(*i*) *Ante*, pp. 201, 209.
(*k*) *Ante*, pp. 591, 607, n. (*i*).
(*l*) *Ante*, pp. 203, 204.
(*m*) *Ante*, pp. 201, 202.
(*n*) *Ante*, p. 532.
(*o*) Whatever amount may be agreed on, it should of course be sufficient to reinstate the buildings if destroyed.
(*p*) Such a covenant is always inserted when the mortgaged lands have houses or buildings erected thereon.
(*q*) *Ante*, p. 543.

case of a breach of any of the provisions of the covenant next hereinbefore contained

Restriction on the exercise of the mortgagor's powers of leasing.

AND IT IS HEREBY AGREED that the mortgagor shall not exercise any of the powers of leasing given by law to a mortgagor of land without the consent in writing of the mortgagees (*r*)

Mortgagees not to be liable for involuntary losses.

PROVIDED ALWAYS AND IT IS HEREBY AGREED that the mortgagees shall not be answerable for any involuntary losses which may happen in or about the execution of any of the powers and trusts vested in them as mortgagees under these presents (*s*)

IN WITNESS &c. (*t*)

2. A SETTLEMENT OF FREEHOLD LANDS ON MARRIAGE.

Date. Parties.

THIS INDENTURE made the 17th day of January 1901 BETWEEN A. B. [*the settlor and intended husband*] of [*description*] of the first part C. D. [*the intended wife*] of [*description*] of the second part E. F. of [*description*] and G. H. of [*description*] [*proposed trustees*] of the third part and J. K. [*grantee to uses*] of the fourth part

Testatum.

WITNESSETH that in consideration of a marriage intended to be solemnized between the said A. B. and C. D. and in pursuance of an agreement in this behalf entered into upon the treaty for the said intended marriage the said A. B. doth hereby grant AS SETTLOR (*u*) unto the said J. K.

Operative words.

Parcels.

ALL AND SINGULAR the manor mansion house messuages lands tenements and hereditaments described in the Schedule hereto

TO HAVE AND TO HOLD the same premises unto the said J. K. in fee simple (*x*)

To the use of the settlor till the marriage.

TO THE USE OF the said A. B. in fee simple until the said intended marriage and after the solemnization thereof (*y*)

Pin money rent-charge.

TO THE USE that the said C. D. shall thenceforth during the joint lives of the said A. B. and C. D. receive out of all the premises the yearly rent-charge of 300*l.* as her separate property but without power of anticipation (*z*) to commence from the day of the solemnization of the said intended marriage and to be payable by equal quarterly

(*r*) *Ante*, pp. 537, 538.

(*s*) This protection is given by the Conveyancing Act of 1881 with regard to the exercise of the power of *sale* thereby conferred; stat. 44 & 45 Vict. c. 41, s. 21 (6); but it is usual to give to mortgagees a general indemnity; 2 Key and Elphinstone, Prec. Conv. 64, 76, 4th ed.: Davidson's Concise Precedents, 227, n. (*a*), 17th ed.

(*t*) *Ante*, p. 595; see *ante*, p. 532, n. (*y*), as to the proper stamps.

(*u*) *Ante*, p. 591.

(*x*) *Ante*, pp. 201, 202. Care must be taken duly to limit an estate in fee simple to the grantee to uses, or those to whom the use of the lands is given will take legal estates by the operation of the Statute of Uses during his life only; see Dyer 186a; *Jenkins* v. *Young*, Cro. Car. 230; *Meredith* v. *Joans*, *ib.* 244; Sug. Pow. 149, 8th ed.; Williams on Settlements, 7.

(*y*) *Ante*, p. 368.

(*z*) *Ante*, pp. 309—312.

payments on the usual quarter days without any deduction (*a*) the first payment of an apportioned part (*b*) of the said rent-charge to be made on the first of such quarter days which shall occur after the solemnization of the said intended marriage (*c*) And subject to the said rent-charge

To the use of the settlor for life.

To the use of the settlor for life.

To the use of the said A. B. during his life (*d*) without impeachment of waste (*e*) And after his death

Jointure rent-charge.

To the use that the said C. D. shall thenceforth receive during her life out of all the premises the yearly rent-charge of 2,000*l.* by way of jointure and in bar of dower (*f*) to commence from the day of the death of the said A. B. and to be payable by equal quarterly payments on the usual quarter days without any deduction (*g*) the first payment of an apportioned part (*h*) of the said rent-charge to be made on the first of such quarter days which shall occur after the death of the said A. B. (*i*) And subject to the said rent-charge

To trustees for a term to raise portions.

To the use of the said E. F. and G. H. for the term of one thousand years to commence from the death of the said A. B. (*k*) without impeachment of waste (*l*) upon the trusts and subject to the provisions hereinafter declared and contained And subject to the said term

To the first and other sons of the marriage in tail male.

To the use of the first and other sons of the said A. B. by the said C. D. severally and successively in remainder one after the other according to seniority in tail male (*m*) with remainder

To the settlor in fee simple.

To the use of the said A. B. in fee simple (*n*)

(*a*) See Davidson. Prec. Conv. iv. 402, n. (*k*). 3rd ed.

(*b*) *Ante*, p. 129.

(*c*) *Ante*, pp. 419—421.

(*d*) *Ante*, pp. 112, 205.

(*e*) *Ante*, p. 116.

(*f*) *Ante*, pp. 317, 318.

(*g*) See note (*a*) above.

(*h*) *Ante*, p. 129.

(*i*) *Ante*, pp. 419—421.

(*k*) *Ante*, pp. 492, 516 *sq.*

(*l*) *Ante*, pp. 116, 495, 496.

(*m*) *Ante*, pp. 100, 202.

(*n*) *Ante*, pp. 338—341. These limitations are those usually contained in a settlement made by one seised in fee on his own marriage. Where the settlement is made by a father, tenant for life, and his son, tenant in tail, on the occasion of the son's marriage or attainment of majority, the limitations are much more elaborate. It is usual, though not of course absolutely necessary, to carry out such a settlement by two deeds. The first is a disentailing assurance duly enrolled, whereby the father and son grant their respective estates in the lands to a third person, usually the family solicitor, in fee simple to such uses as the father and son shall by deed jointly appoint, and in default of such appointment to such uses as the son, if he shall survive the father, shall by deed or will appoint, and in default of such appointment to the uses to which the lands previously stood limited. By the second deed the father and son in exercise of their joint power of appointment appoint that the lands shall thenceforth remain to the uses thereinafter declared, and by way of further assurance grant the lands, according to their respective estates therein, to a third person in fee simple to the same uses; see *ante*, pp. 373, 380. Uses are then declared, under which the son takes a rent-charge for his support during the father's life, and the son's wife (if the settlement is

Trusts of term to raise portions, &c.

AND IT IS HEREBY AGREED AND DECLARED [*Here follow the trusts of the term of one thousand years, which are shortly to raise after the settlor's death or in his lifetime at his request in writing by mortgage of all or any part of the premises for the whole or part of the term or by sale of timber or minerals or out of the rents and profits or by any other reasonable means, portions for the children or child of the marriage, other than the first or only or other son who before attaining the age of twenty-one years shall become entitled in possession or remainder to the first estate in tail male, who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age, namely (say)* 10,000*l. if there shall be but one such child,* 18,000*l. if there shall be but two,* 24,000*l. if there shall be but three, and* 30,000*l. if there shall be four or more such children; such sums to be paid to such one or more exclusively of the others or other of such children at such times not previously in the case of sons to the attainment of majority, and in the case of daughters to majority or marriage, and subject to such provisions as the settlor shall by deed or will appoint, and in default of such appointment to be divided equally between the children if more than one, and paid to sons at twenty-one and to daughters at twenty-one or marriage. There are added a hotchpot clause providing that a child to whom any appointment is made must bring the sum appointed into account before taking any of the unappointed part of the trust fund* (*o*), *and provisions for the maintenance of the younger children during minority after the settlor's death, for the advancement of part of their portions for their benefit, for the tenant for life to keep down the interest on money raised for portions in his lifetime, and for the surplus rents to be taken by the reversioner* (*p*). *Then follow powers for the settlor to jointure a future wife, and to charge portions for the children of a future marriage* (*q*).]

made on his marriage) a rent-charge for her life in case she shall be left a widow in the father's lifetime, and a rent-charge of larger amount for her jointure if she shall survive both the father and the son, and the father has a life estate in restoration of his former life estate, and after the father's death the lands are limited to the son for life, with remainder to trustees for a term to raise portions for his younger children, with remainder to his first and other sons in tail male, with divers other remainders, as to the father's other sons, if any be living, successively for life with remainder to their sons in tail male, and to the sons' daughters in tail, the ultimate remainder being to the son, who was the disentailing tenant in tail, in fee simple. See Williams on Settlements, 214—218, 288—291; Davidson, Prec. Conv. iii. 324—330, 3rd ed.; Wms. Conv. Stat. 517.

(*o*) See Wms. Pers. Prop. 354, 565, 15th ed.

(*p*) *Ante*, pp. 516, 517. As to the object and form of the trusts of a term to raise portions, see Williams on Settlements, 219, 259 *sq.*; Davidson, Prec. Conv. i. 321, 5th ed.; iii. 405 *sq.*, 988, 3rd ed.; Davidson's Concise Precedents, 522, 17th ed.

(*q*) See Williams on Settle-

AND IT IS HEREBY AGREED AND DECLARED that the said E. F. and G. H. shall be the trustees of these presents for the purposes of the Settled Land Acts 1882 to 1890 (*r*) and the 42nd section of the Conveyancing and Law of Property Act 1881 (*s*)

Appointment of trustees for the purposes of the Settled Land Acts.

AND THAT it shall be lawful for the said A. B. to exercise all or any of the powers given to a tenant for life by the said Settled Land Acts with respect to all or any part of the hereditaments hereby assured without giving to the trustees for the time being of these presents for the purposes of the same Acts any notice of his intention in that behalf (*t*) and as regards the principal mansion house on the same hereditaments and the pleasure grounds and park and lands usually occupied therewith or any part thereof respectively without the consent of the same trustees or an order of the Court (*u*)

Provision dispensing with notice to such trustees.

And with the restriction on sale or lease of principal mansion house, &c.

AND THAT the whole of the rent reserved by any mining lease of the premises to be granted under the Settled Land Acts 1882 to 1890 shall be received by the person or persons for the time being entitled to receive the rents and profits of the premises and shall be applicable by him or them as rents and profits and no part of any such rent shall be set aside as capital money arising under the said Settled Land Acts (*x*)

Provision as to rent on mining leases.

AND THAT in the event of the death of any person who shall have been entitled in possession to the premises for an estate in tail male by these presents limited to him as purchaser under the age of twenty-one years the said E. F. and G. H. or other the trustees or trustee for the time being of these presents shall apply any fund which they or he may have accumulated pursuant to the 42nd section of the Conveyancing and Law of Property Act 1881 out of income arising from the premises whilst such infant was so entitled in possession in the same manner as capital money arising under the Settled Land Acts 1882 to 1890 (*y*)

Accumulations during minority.

IN WITNESS &C (*z*)

The Schedule above referred to [*contains a particular description of the property conveyed*]

ments, 290; Davidson, Prec. Conv. iii. 466 *sq.*, 1001 *sq.*, 3rd ed.

(*r*) *Ante*, p. 119.

(*s*) *Ante*, p. 290, n. (*s*).

(*t*) *Ante*, pp. 119, 121, n. (*i*).

(*u*) *Ante*, pp. 119—121. A settlor, who is himself seised in fee, will naturally desire to be unrestricted in his exercise of the powers given by the Settled Land Acts; but it is not common, in the case of family re-settlements, so to remove the restriction on the sale or leasing of the principal mansion house.

(*x*) *Ante*, pp. 120, 121.

(*y*) In default of this provision, the accumulations would belong to the infant's legal personal representatives. See Wms. Conv. Stat. 206, 209.

(*z*) *Ante*, p. 595. Deeds of settlement of real estate are charged with a stamp duty of 10*s.* only; *ante*, p. 153, n. (*t*).

PART VII.

OF LAND REGISTERED UNDER THE LAND TRANSFER ACTS.

As we have seen (*a*), under the Land Transfer Acts, 1875 and 1897 (*b*), and the Order in Council made thereunder, registration of the title to lands situate in the county and city of London has been made compulsory on sale. It is therefore necessary to give some account of the system of registration of title established by these Acts. Registration of title was first introduced as a voluntary system by an Act of 1862 (*c*), but this Act, having met with small success, was superseded by the Land Transfer Act, 1875 (*d*). Registration under the Act of 1875 was also optional, and was but seldom employed. The Act of 1897 and the Land Transfer Rules, 1898, amended the Act of 1875 in several important particulars, besides providing for compulsory registration in the manner already described (*e*).

Office of land registry.

Under the Land Transfer Acts, 1875 and 1897 (*f*), there is established an office of land registry, with a

(*a*) *Ante*, pp. 207, 208.

(*b*) Stat. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*c*) Stats. 25 & 26 Vict. c. 53; see Sug. V. & P. 505 *sq.*, 14th ed. Another Act of the same session. stat. 25 & 26 Vict. c. 67, empowered persons claiming to be entitled to land in possession for an estate in fee simple, or claiming power to dispose of such an estate, to apply to the Court of Chancery for a declaration of title; see Sug. V. & P. 511 *sq.*, 14th ed. This Act does not appear to have been repealed.

(*d*) Stat. 38 & 39 Vict. c. 87. s. 125.

(*e*) *Ante*, pp. 207, 208, 493, 504, 510.

(*f*) Stats. 38 & 39 Vict. c. 87, ss. 106 *sq.*; 60 & 61 Vict. c. 65, pt. ii.; Land Transfer Rules, 1898, hereinafter referred to as L. T. R. (1898).

registrar and other officials. Application may be made at this office for registration of the applicant or his nominee or nominees as the proprietor or proprietors, either with an absolute title or with a possessory title only, of any freehold land, or of any leasehold land held under a lease which is either immediately or mediately derived out of land of freehold tenure and is for or determinable on a life or lives or for a term of years of which more than twenty-one are unexpired (*g*). An underlease is, but a term created for mortgage purposes (*h*) is not to be deemed such a lease (*i*). Copyholds are excepted from the Acts; and so are customary freeholds (*k*), in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*l*). The term *land* as used in the Acts includes all hereditaments, corporeal or incorporeal (*m*); and the title to an undivided share of land may be registered (*n*). The Acts do not apply to Scotland or Ireland (*o*).

What land may be registered.

The persons entitled to apply for registration are (1) any person who has contracted to buy for his own benefit, in the case of freeholds, an estate in fee simple, or in the case of leaseholds, land held under such a lease as above-mentioned, and in either case whether subject or not to incumbrances, provided that the vendor consent to the application; (2) any person entitled for his own benefit at law or in equity to such an estate in freeholds or such leasehold land, subject or not as aforesaid; (3) any person capable of disposing for his own benefit of such an estate in freeholds or such

Who is entitled to apply for registration.

(*g*) Stat. 38 & 39 Vict. c. 87, ss. 2, 5, 11, as amended by 60 & 61 Vict. c. 65, s. 14, and First Schedule; Land Transfer Rules, 1898, Nos. 43—57.

(*h*) *Ante*, pp. 546, 548.

(*i*) Stat. 60 & 61 Vict. c. 65, First Schedule.

(*k*) *Ante*, pp. 453—455.

(*l*) Stat. 38 & 39 Vict. c. 87, s. 2; see 60 & 61 Vict. c. 65, First Schedule.

(*m*) Stat. 60 & 61 Vict. c. 65, s. 24.

(*n*) Stat. 60 & 61 Vict. c. 65, s. 14 (1); L. T. R. (1898) 67.

(*o*) Stat. 38 & 39 Vict. c. 87, s. 2.

leasehold land, subject or not as aforesaid (*q*); (4) any person holding land on trust for sale, and any trustee, mortgagee or other person having power of sale, with the consent in each case of the persons (if any) whose consent is required to the exercise by the applicant of his trust or power of sale (*r*); and (5) any two or more persons entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights or interests in land as would, if vested in one person, entitle him to be registered as proprietor of the land. These last may apply to be registered as joint proprietors in the same manner and with the same incidents, so far as circumstances admit, as a single proprietor (*s*).

Application for registration with absolute title.

Where an absolute title is required, the applicant or his nominee shall not be registered as proprietor of the fee simple unless and until the title is approved by the registrar (*t*). On an application for registration with an absolute title, the title is investigated in the office, an abstract of title in the usual form (*u*) being furnished by the applicant, and the abstracted documents and other usual evidence verifying the abstract (*x*) being produced (*y*). The title is examined by or under the superintendence of the registrar in accordance with the usual conveyancing practice, the registrar being at liberty to refer the whole or any part of the examination for the opinion of one of the official examiners of title, and to act on such opinion (*z*). The application is advertised, stating a time within which objections may be made (*a*), and any person may object to the registration (*b*). If

(*q*) Stat. 38 & 39 Vict. c. 87. ss. 5, 11; 60 & 61 Vict. c. 65, First Schedule.
(*r*) Stat. 38 & 39 Vict. c. 87. s. 68.
(*s*) Sect. 69, as amended by stat. 60 & 61 Vict. c. 65, s. 14 (1), and First Schedule.
(*t*) Stat. 38 & 39 Vict. c. 87, s. 6.
(*u*) *Ante*, p. 571.
(*x*) *Ante*, p. 572.
(*y*) Stat. 38 & 39 Vict. c. 87. s. 17; L. T. R. (1898) 25—41.
(*z*) L. T. R. (1898) 31.
(*a*) Stat. 38 & 39 Vict. c. 87, s. 17 (1); L. T. R. (1898) 32.
(*b*) Rule 35.

any such objection is made, the title shall not be registered as absolute until the objection has been either withdrawn or otherwise disposed of (*c*). The registrar has jurisdiction to hear and determine any such objection, subject to an appeal to the Court; or the registrar may, instead of deciding any question himself, refer it at once to the Court for decision (*d*). If the registrar, upon the examination of any title, is of opinion that the title is open to objection, but is nevertheless a title, the holding under which will not be disturbed (*e*), he may approve of such title, or may require the applicant to apply to the Court, upon a statement signed by the registrar, for its sanction to the registration (*f*). All jurisdiction vested by the Acts or Rules in the Court is assigned to the senior Judge for the time being of the Chancery Division of the High Court (*g*). Before the completion of the registration of any land in respect of which an examination of title is required, the vendor and his solicitor, in cases where the applicant is a person who has contracted to buy such land, and in all other cases (*h*) the applicant and his solicitor, must each make a statutory declaration that all deeds, wills and instruments of title, and all charges and incumbrances affecting the title to the land and all facts material to such title have been disclosed in the course of the investigation of title made by the registrar (*i*). And a person shall not be registered as the proprietor of land until, if required by the registrar, he has produced to him such documents of title as will, in his opinion, when stamped or otherwise marked, give notice to any purchaser or other person dealing with the land of the fact of registration, and the registrar shall stamp or otherwise mark the same

Power to approve of a good holding title.

(*c*) Rule 36.
(*d*) Stat. 38 & 39 Vict. c. 87, s. 17 (2); L. T. R. (1898) 232.
(*e*) *I.e.*, what is called a good *holding* title as distinguished from a good *marketable* title; see *ante*, p. 577.
(*f*) Stat. 38 & 39 Vict. c. 87, s. 17 (3).
(*g*) L. T. R. (1898) 234.
(*h*) *Ante*, pp. 617, 618.
(*i*) Stat. 38 & 39 Vict. c. 87, s. 70; L. T. R. (1898) 41.

accordingly, or until he has otherwise satisfied the registrar that the fact of registration cannot be concealed from a purchaser or other person dealing with the land (*k*). When these requirements have been complied with, and all requisitions and objections (if any) have been disposed of, and at the expiration of the time fixed by the advertisements (*l*) and by any notices that may have been directed, the registration is completed (*m*).

Qualified title.

Where an absolute title is required, and on the examination of the title it appears to the registrar that the title can be established only for a limited period or subject to certain reservations, the registrar may, at the request of the applicant, by entry in the register except from the effect of registration any estate, right or interest arising before a specified date, or under a specified instrument, or otherwise particularly described in the register; and a title registered subject to such excepted estate, interest or right is called a qualified title (*n*).

Application for registration with possessory title.

Where registration with possessory title only is applied for, the applicant is only required to produce either a conveyance of the land to himself on sale, or a statutory declaration by himself or his solicitor that he is in possession of the land and is entitled thereto in fee simple for his own benefit, or otherwise, as the case may be, accompanied by the latest document of title (if any) in his possession or control, and sufficient particulars to identify the land on the ordnance map (*o*). The title is not investigated (*p*), nor is the application advertised. There is, however, the same requirement

(*k*) Stat. 38 & 39 Vict. c. 87, s. 72.
(*l*) *Ante*, p. 618.
(*m*) L. T. R. (1898) 38.
(*n*) Stat. 38 & 39 Vict. c. 87, s. 9 : see L. T. R. (1898) 42.
(*o*) Stat. 38 & 39 Vict. c. 87, s. 16 ; L. T. R. (1898) 17.
(*p*) L. T. R. (1898) 18.

as upon registration with an absolute or qualified title, with respect to satisfying the registrar, by production of documents of title or otherwise, that the fact of registration cannot be concealed from a purchaser or other person dealing with the land, and with respect to marking such documents with notice of the registration (*q*); but in the case of registration with a possessory title the registrar is empowered to act on such reasonable evidence as may be prescribed by the Rules as to the sufficiency of the documents produced, and as to dispensing with their production in special circumstances (*r*). When an application for registration with a possessory title has been duly made, and the entries and plan have been duly settled, the registration is effected as of the day on which and in the priority in which the application was delivered at the registry (*s*).

Application for registration of leasehold land.

The above provisions apply to applications for registration of leasehold land as well as freehold: but in the case of leaseholds a grant or assignment of a lease or sub-lease is to be produced on application for registration with a possessory title, instead of a conveyance on sale (*t*); the lease, if in the possession or control of the applicant, and if not a copy thereof, must be delivered with the application, whether the title applied for be absolute or possessory (*u*); and when an absolute title is required,

(*q*) Stat. 38 & 39 Vict. c. 87, s. 72; *ante*, p. 619.

(*r*) Stat. 60 & 61 Vict. c. 65. First Schedule. The rules only prescribe such evidence as above mentioned (L.T. R. (1898) 17): that if a document of title be delivered with the application, it shall be marked with notice of the registration (r. 20); that where the deeds produced to be marked are numerous, the registrar may act on a statutory declaration of the applicant's solicitor that all the lands included in the application are dealt with by such deeds, and that such deeds are all the deeds necessary to be marked (r. 21); and that if, in any case it is proved to the satisfaction of the registrar, by the statutory declaration of the applicant's solicitor or otherwise, that any document of title requiring to be marked cannot be produced, the registrar may complete the registration without such production (r. 22).

(*s*) L. T. R. (1898) 19.

(*t*) L. T. R. (1898) 43: *ante*, p. 620.

(*u*) Rule 44.

no person shall be registered as proprietor until and unless the title both to the leasehold and the freehold, and to any intermediate leasehold that may exist, is approved by the registrar (*x*).

Land certificate.

On entry on the register of the name of the first registered proprietor of any freehold or leasehold land, the registrar is required to prepare a land certificate, certifying that the proprietor is registered as proprietor of the land described therein, and stating whether his title is absolute, qualified or possessory. The land certificate may be delivered to the proprietor, or deposited in the registry, as he may prefer (*y*).

Effect of first registration with absolute title, as to freeholds.

The first registration of any person as proprietor of freehold land with an absolute title shall vest in him an estate in fee simple in such land, together with all rights, privileges and appurtenances belonging or appurtenant thereto, subject as follows:—(1) to the incumbrances, if any, entered on the register, and (2) unless under the provisions of the Acts the contrary is expressed on the register, to such liabilities, rights and interests (if any) as are by the Acts declared not to be incumbrances (*z*), and (3) where such first proprietor

(*x*) Rule 46.

(*y*) Stats. 38 & 39 Vict. c. 87, s. 10; 60 & 61 Vict. c. 65, s. 8 (4); L. T. R. (1898) 55, 204—208.

(*z*) By stat. 38 & 39 Vict. c. 87, s. 18, as amended by 60 & 61 Vict. c. 65, First Schedule, all registered land shall, unless under the provisions of the Acts the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed incumbrances within the meaning of the Acts (that is to say),

(1) Liability to repair highways by reason of tenure, quit rents, Crown rents, heriots, and other rents and charges having their origin in tenure; and

(2) Succession duty, estate duty, land tax, tithe rent-charge and payments in lieu of tithes or of tithe rent-charge; and

(3) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements; and

(4) Rights to mines and minerals created previously to the registration of the land or the 1st of January, 1898; and

(5) Rights of entry, search, and user, and other rights and

is not entitled for his own benefit as between himself and any persons claiming under him to any unregistered estates, rights, interests or equities to which such persons may be entitled:—but free from all other estates and interests whatsoever, including those of

reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals, and created previously to the registration of the land or the 1st of January, 1898; and

(6) Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises exercisable over the registered lands; also liability to repair the chancel of any church, liability in respect of embankments and river walls, and drainage rights, customary rights, public rights, and profits *à prendre*; and

(7) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies; also, subject to the provisions of the Land Transfer Act, 1897, rights acquired under the Limitation Acts:

Provided as follows:

(a) Where it is proved to the satisfaction of the registrar that any land registered, or about to be registered, is exempt from land tax or tithe rent-charge, or from payments in lieu of tithes or of tithe rent-charge, the registrar may notify the fact on the register in the prescribed manner (see L. T. R. (1898) 175); and

(b) The Commissioners of Inland Revenue shall, upon the application of the proprietor of any land registered or about to be registered, upon such declaration being made, or such other evidence being produced as the Commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall in the prescribed manner notify such fact on the register, and such notification shall be conclusive evidence of the fact so notified in respect of succession duty (see, however, stat. 60 & 61 Vict. c. 65, s. 13, which appears to supersede this provision); and

(c) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land (see L. T. R. (1898) 176); and

(d) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as proprietor of such mines and minerals in manner in the Act of 1875 (see s. 82; L. T. R. (1898) 61, 64) mentioned, and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.

Where the existence of any such liabilities, rights or interests, as are mentioned in this section, is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights or interests in the prescribed manner. This power shall be exercised in all cases where the abstract of title

Effect of first registration with a qualified or a possessory title, as to freeholds.

the Crown (*a*). The registration of any person as first registered proprietor of freehold land with a qualified or with a possessory title shall have the same effect as registration with an absolute title; except that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted (*b*), and registration with a possessory title shall not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of such first registered proprietor and subsisting or capable of arising at the time of registration of such proprietor (*c*).

Effect of first registration with an absolute title, as to leaseholds.

The registration of any person as first registered proprietor of leasehold land with an absolute title shall be deemed to vest in him the possession (*d*) of the land comprised in the registered lease relating to such land for all the leasehold estate therein described, with all implied or expressed rights, privileges and appurtenances attached to such estate, but subject as follows:—(1) to all implied and expressed covenants, obligations and liabilities incident to such leasehold estate; and (2) to the incumbrances (if any) entered on the register; and (3) unless the contrary is expressed on the register, to such liabilities, rights and interests as affect the leasehold estate, and are by the Acts declared not to be incumbrances in the case of registered freehold land (*e*); and (4) where such first proprietor is not entitled for his

on first registration or on registration as qualified or absolute discloses the existence of any such liabilities as are mentioned in sub-sections 4 and 5. (See L. T. R. (1898) 177, 178.) Where an easement is registered as an incumbrance, the dominant and servient tenements shall be defined, if practicable, and required by the parties. Notice of a power of re-entry and of a right of reverter may be entered on the register under this paragraph.

(*a*) Stat. 38 & 39 Vict. c. 87. s. 7. By s. 105, nothing in the Act shall affect the right of the Crown to any escheat or forfeiture.

(*b*) *Ante*, p. 620.

(*c*) Stat. 38 & 39 Vict. c. 87. ss. 8, 9.

(*d*) See *ante*, p. 493.

(*e*) *Ante*, p. 622, n. (*z*).

own benefit to the land registered as between himself and any persons claiming under him to any unregistered estates, rights, interests or equities to which such persons may be entitled :—but free from all other estates and interests whatsoever, including those of the Crown (*f*). Registration of a person as first proprietor of leasehold land with a qualified or with a possessory title shall have the same effect as registration with an absolute title : except that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted (*g*), and registration with a possessory title shall not affect or prejudice the enforcement of any estate, right or interest (whether in respect of the lessor's title or otherwise) adverse to, or in derogation of, the title of such first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor (*h*).

Effect of first registration with a qualified or a possessory title, as to leaseholds.

A tenant for life having the power of sale given by the Settled Lands Acts (*i*) comes under the description of those entitled to apply for registration of land (*k*) ; and settled land may, at the option of the tenant for life, be registered either in the name of the tenant for life or, where there are trustees with powers of sale, in the names of those trustees, or, where there is an overriding power of appointment of the fee simple, in the names of the persons in whom that power is vested (*l*) : but there shall also be entered on the register such restrictions or inhibitions as may be prescribed by the rules or may be expedient for the protection of the rights of the persons beneficially interested in the land (*m*). The registered

Registration of settled land.

(*f*) Stat. 38 & 39 Vict. c. 87, s. 13, as amended by L. T. R. (1898) 47.
(*g*) *Ante*, p. 620.
(*h*) L. T. R. (1898) 48, 49.
(*i*) *Ante*, p. 121.
(*k*) *Ante*, p. 618.
(*l*) Stat. 60 & 61 Vict. c. 65, s. 6 (1).
(*m*) Sect. 6 (2) ; see L. T. R. (1898) 70, 71.

proprietor of settled land and all other necessary parties (if any) shall, on the request, and at the expense, of any person entitled to an estate, interest or charge conveyed or created for securing money actually raised at the date of such request (*n*), charge the land in the prescribed manner with the payment of the money so raised (*o*). Subject to the maintenance of the right of the registered proprietor to deal by registered disposition, or by way of mortgage by deposit, with any land whereof he is registered as proprietor, the estates, rights and interests of the persons for the time being entitled under any settlement comprising the land shall be unaffected by the registration of that proprietor (*p*).

Effect of first registration where the applicant has not the legal estate.

It will be observed (*q*) that a person entitled to apply for registration is not necessarily the person seised of or entitled to the legal estate in the land which he desires to register. He may, for example, be merely interested as purchaser under a contract for sale (*r*), or entitled in equity only under a simple trust for his benefit (*s*), or he may have a general power of appointment over land of which, in default of appointment, some other is seised in fee (*t*). In all these cases the effect of his registration as proprietor of the land appears to be to vest in him the fee simple or the leasehold estate in the registered land, without any conveyance from the person previously seised of or entitled to the land at law; and as the estate so vested in the registered proprietor is to be free from all estates and interests except such as are expressly excepted from the effect of registration (*u*), the estates of those previously seised or entitled at law appear to be extinguished. The effect of first registration thus appears to resemble the effect of a conveyance by a tenant for life under the power of conveyance given by

(*n*) See *ante*, p. 393, n. (*x*).
(*o*) Stat. 60 & 61 Vict. c. 65, s. 6 (7).
(*p*) Sect. 6 (8).
(*q*) *Ante*, pp. 617, 618.
(*r*) *Ante*, p. 182.
(*s*) *Ante*, p. 178.
(*t*) *Ante*, pp. 371, 373.
(*u*) *Ante*, pp. 622—625.

the Settled Land Acts (*x*). As we have seen (*y*), where a tenant for life of settled land is registered as proprietor thereof, the registration does not affect the estates, rights and interests of the persons for the time being entitled under the settlement. In this case, therefore, it does not appear that the effect of registration is to vest in him the estate in fee simple: although, as we have seen, there is expressly reserved to him the right to deal with the settled land by registered disposition or by way of mortgage by deposit, and for these purposes, it seems, he can dispose of the whole estate which would otherwise have vested in him on registration.

Dispositions of registered land.

Every registered proprietor of any freehold or leasehold land may transfer the land or any part thereof, or charge the same with the payment at an appointed time of any principal sum of money, with or without interest, and with or without a power of sale to be exercised at or after a time appointed, or with an annuity or other periodical payment. Such transfers or charges are required to be made by instrument of transfer or charge drawn up in the form prescribed by the Rules (*z*), executed as a deed, and attested in the presence of a witness, who shall write his name, address and description in the attestation clause, and duly stamped (*a*); and they must be completed by entry in the register of the transferee or chargee as proprietor of the land transferred or charge created (*b*). And until such entry is made upon

(*x*) *Ante*, pp. 118, 123, 392—394.

(*y*) *Ante*, p. 626.

(*z*) Special provisions are made as to mortgages to building societies, friendly societies and industrial and provident societies; stat. 60 & 61 Vict. c. 65, s. 9 (3); L. T. R. (1898) 113, 163; L. T. R. (1899) 7.

(*a*) The stamp duties payable are those which would have been payable on a similar disposition of the land made by an unregistered instrument. But where an instrument of transfer or charge is executed for the sole purpose of carrying out on the register a transaction already effected by a deed or other instrument not on the register, the last-mentioned deed or instrument shall be stamped, and the registered instrument shall bear no stamp duty. See stat. 38 & 39 Vict. c. 87, s. 83 (7); L. T. R. (1898) 163.

(*b*) Stats. 38 & 39 Vict. c. 87.

Unregistered dispositions of registered land.

a transfer, the transferor is to be deemed to remain the proprietor of the land. But, subject to the maintenance of the estate and right of the registered proprietor, any person, whether the registered proprietor or not, having a sufficient estate or interest in the land, may create estates, rights, interests and equities in the same manner as if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions or other restrictions as mentioned in the Acts (*c*). A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances belonging or appertaining thereto, subject as follows—(1) to the incumbrances, if any, entered on the register; (2) unless the contrary is expressed on the register, to such liabilities, rights and interests (if any) as are by the Acts declared not to be incumbrances (*d*)—but free from all other estates and interests whatsoever, including those of the Crown (*e*). A transfer for valuable consideration of freehold land registered with a qualified or with a possessory title shall, when registered, have the same effect; save that it shall not affect or prejudice the enforcement, where the title is qualified, of any right or interest appearing by the register to be excepted (*f*), or where the title is possessory, of any right or interest adverse to, or in derogation of, the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor (*g*).

Effect of registered transfer for valuable consideration of freeholds registered with an absolute title.

Effect of registered transfer for valuable consideration of freeholds registered with qualified or possessory title.

ss. 22, 29, 34; 60 & 61 Vict. c. 65, s. 9 (3): L. T. R. (1898) 79 *sq.*, 106 *sq.*, 146, 156—158, 160, 161.

(*c*) Stat. 38 & 39 Vict. c. 87, s. 49.

(*d*) *Ante*, p. 622, n. (*z*).

(*e*) Stat. 38 & 39 Vict. c. 87, s. 30; *cf. ante*, p. 622.

(*f*) *Ante*, pp. 620, 624.

(*g*) Stat. 38 & 39 Vict. c. 87, ss. 31, 32.

A transfer of freehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests or equities subject to which the transferor held the same, but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same lands for valuable consideration (*h*). Registered transfers of leasehold land have the like effect, according as they were made with or without valuable consideration and the title registered was absolute, qualified or possessory: but, instead of conferring an estate in fee simple, they shall be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease, subject (1) to all implied and express warrants, obligations and liabilities incident to such estate, (2) to all incumbrances entered on the register, and (3), unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the leasehold estate and are by the Acts declared not to be incumbrances in the case of registered freehold land (*i*). In all these provisions as to the effect of registered transfers of land (*k*), the word "land," in the absence of anything to the contrary in the register, or in the transfer, or in the case of leasehold land in the lease, includes the mines and minerals if parcel thereof (*l*); so that a registered transfer of any land, like a conveyance of unregistered land (*m*), passes the right to all mines and minerals within and under the same, except, however, rights to mines and minerals created previously to the registration of the land or the year 1898 (*n*). On every entry in the register of a

Effect of registered transfer made without valuable consideration of freeholds.

Effect of registered transfer of leasehold land.

Mines and minerals.

Production of land

(*h*) Stat. 38 & 39 Vict. c. 87, s. 33.

(*i*) Stat. 38 & 39 Vict. c. 87, ss. 35, 38, as amended by L. T. R. (1898) 92, 93.

(*k*) Stat. 38 & 39 Vict. c. 87, ss. 30—33, 35, 38.

(*l*) Stat. 60 & 61 Vict. c. 65, First Schedule.

(*m*) *Ante*, p. 34.

(*n*) *Ante*, p. 622, n. (*z*).

certificate on transfer or charge.

disposition by the registered proprietor of any land, the land certificate, if not deposited in the registry (*o*), must be produced to the registrar, and a note of such entry officially indorsed thereon (*p*). On a registered transfer of the whole of the land to which a land certificate relates, the certificate so indorsed is delivered to or deposited for the transferee; and if part only of the land has been transferred, a new land certificate, relating to the part transferred, is prepared and delivered to or deposited for the transferee (*q*).

Registered charges upon registered lands.

A registered charge upon registered land appears to confer no more than a legal charge or lien upon the lands comprised therein for the money secured; and such charges are subject to the provisions of the Acts as respects qualified or possessory titles (*r*). When such a charge is created, there are implied, in the absence of any entry on the register to the contrary, covenants by the chargor with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest (if any) at the appointed time, and in default, to pay interest half-yearly (*s*). On creation of a registered charge on leasehold land, there is implied, in the absence of any entry on the register to the contrary, a covenant by the chargor with the registered proprietor for the time being of the charge to pay the rent and perform or observe the covenants and conditions of the lease, and indemnify the covenantee against the same (*t*). On the completion of a registered charge, a certificate of charge is required to be prepared, and is either delivered to the proprietor of the charge or deposited in the registry, as he may prefer (*u*): but

Covenant implied on charge on leaseholds.

Certificate of charge.

(*o*) *Ante*, p. 622.

(*p*) Stat. 60 & 61 Vict. c. 65, s. 8 (1); L. T. R. (1898) 204, 205.

(*q*) Stat. 38 & 39 Vict. c. 87, s. 29 (par. 2), as amended by 60 & 61 Vict. c. 65, s. 8.

(*r*) Stats. 38 & 39 Vict. c. 87, s. 22; 60 & 61 Vict. c. 87, First Schedule; *ante*, pp. 620, 622—625.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 23; *cf. ante*, pp. 610, 611.

(*t*) Stat. 38 & 39 Vict. c. 87, s. 24.

(*u*) Stats. 38 & 39 Vict. c. 87, s. 29; 60 & 61 Vict. c. 65, s. 8 (4); L. T. R. (1898) 204—208.

subject to any stipulation to the contrary, the proprietor of a registered charge is not entitled to have custody of the land certificate (*x*), or to require a land certificate to be applied for (*y*). Subject to any entry to the contrary on the register, the registered proprietor of a registered charge has the following remedies, besides, of course, suing on the implied covenant: (1) he may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in posssesion (*z*); (2) he may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time (*a*); (3) if the charge were made with a power of sale, he may, at any time after the expiration of the appointed time, sell and transfer the land charged, or any part thereof, in the same manner as if he were the registered proprietor of such land (*b*). A chargee, upon obtaining an order for foreclosure absolute, becomes absolutely entitled in equity to the land charged (*c*); and he is entitled to be registered as the proprietor thereof (*d*). Apparently, he may be so registered on production of the certificate of charge and an office copy of the order for foreclosure absolute, without production of the land certificate (*e*); and the effect of such

Chargees' remedies.

1. Powers of entry.

2. Foreclosure.

3. Sale under power of sale.

(*x*) *Ante*, p. 622.
(*y*) Stat. 60 & 61 Vict. c. 65, s. 8 (4).
(*z*) Stat. 38 & 39 Vict. c. 87, s. 25; *ante*, p. 534.
(*a*) Sect. 26; *ante*, pp. 539, 540.
(*b*) Sect. 27.
(*c*) *Ante*, p. 540.
(*d*) L. T. R. (1898) 110.
(*e*) Stat. 60 & 61 Vict. c. 65, s. 8; L. T. R. (1898) 110.

registration would seem to be to vest in him the legal estate in the land. Where a transfer is made by the registered proprietor of a charge in exercise of the power of sale conferred by the charge, the transfer may be registered, and a new land certificate issued to the purchaser, without production of the former land certificate, but the certificate of charge must be produced or accounted for (*g*). And on registration of such a transfer, the purchaser appears to acquire the legal estate in the land sold (*h*). With regard to the creation of a statutory charge with power of sale, the Land Transfer Act, 1897 (*i*), applied to registered charges the power of sale and other powers given by the Conveyancing Act of 1881 (*k*) to mortgagees by deed; so that, as the instrument of charge is a deed (*l*), the chargee will have all these powers in the absence of stipulation to the contrary (*m*). Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created (*n*). The registered proprietor of any charge may transfer the charge to another person by instrument of transfer drawn up in the prescribed form, and executed and attested as required in the case of a transfer of land (*o*), and completed by entry on the register of the transferee as proprietor of the charge transferred: but until such entry the transferor shall be deemed to remain proprietor of the charge. On such entry being made, the certificate of charge must be produced and indorsed therewith, and will then be delivered to or deposited for the transferee. A registered transferee for value of a charge, and his

Priorities of registered charges.

Transfer of charge.

(*g*) Stat. 60 & 61 Vict. c. 65, s. 8 (4).
(*h*) *Ante*, pp. 628, 629.
(*i*) Stat. 60 & 61 Vict. c. 65, s. 9 (2).
(*k*) Stat. 44 & 45 Vict. c. 41, ss. 19—24, except s. 21 (1, 4); *ante*, pp. 541—543.
(*l*) *Ante*, p. 627.
(*m*) See L. T. R. (1898) 106.
(*n*) Stat. 38 & 39 Vict. c. 87, s. 28.
(*o*) *Ante*, p. 627.

successors in title, shall not be affected by any irregularity or invalidity in the original charge, of which he was not aware when it was transferred to him (*p*). The registered proprietor of a charge may also make a registered charge, called a sub-charge, thereon in the same manner as the registered proprietor of land can make a registered charge thereon (*q*), and with the like incidents (*r*); and a certificate of sub-charge will be issued accordingly (*s*). The cessation of a registered charge is required to be notified on the register, at the requisition of the registered proprietor of the charge, or on due proof of the satisfaction thereof, by cancellation of the original entry or otherwise; and thereupon the charge shall be deemed to have ceased (*t*). Nothing contained in any charge shall take away from the registered proprietor thereof the power of transferring it by registered disposition or requiring the cessation thereof to be noted on the register, or affect any registered dealing with land or a charge in respect of which the charge is not expressly registered or protected in accordance with the Acts (*u*). The above provisions (*x*) appear to apply to registered charges of an annuity or other periodical payment (*y*); in addition to which the chargee would appear to have the remedies given by sect. 44 of the Conveyancing Act of 1881 (*z*).

Sub-charge.

Cessation of a registered charge.

The registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges or rights, create a lien on the land or charge by deposit of the land certificate or certificate of charge; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of

Charge by deposit of the land certificate or certificate of charge.

(*p*) Stat. 38 & 39 Vict. c. 87, s. 40, as amended by 60 & 61 Vict. c. 65, s. 8, and First Schedule.
(*q*) L. T. R. (1898) 124.
(*r*) Rule 125.
(*s*) Rule 126.
(*t*) Stat. 38 & 39 Vict. c. 87, s. 28; L. T. R. (1898) 16, 112.
(*u*) Stat. 60 & 61 Vict. c. 65, s. 9 (4).
(*x*) *I.c.*, stats. 38 & 39 Vict. c. 87, ss. 22—28, 40; 60 & 61 Vict. c. 65, s. 9 (4).
(*y*) Stat. 60 & 61 Vict. c. 65, s. 9 (3).
(*z*) *Ante*, p. 421.

title-deeds (*a*) or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage (*b*). And any person with whom such certificate is deposited as security for money may give notice of the deposit to the registrar; and such notice shall be entered in the Charges Register, and shall operate as the lodgment of a caution (*bb*).

Transmission on death or bankruptcy.

Provision is made for the registration, on the death of the sole proprietor or of the survivor of several joint proprietors (*c*) of any registered land or charge, of the persons entitled by law to succeed thereto (*d*). Where the deceased proprietor's estate or interest was absolute, his legal personal representatives are entitled to be registered in his place (*e*); or a devisee or legatee of the property, or a person to whom the property has been appropriated in satisfaction of a legacy or share of residue, may be registered as proprietor with the personal representatives' assent (*f*); and if the deceased proprietor died intestate, the heir in the case of freeholds, and any person entitled under the Statute of Distributions in the case of leaseholds or a charge, may be registered as proprietor upon a transfer from the administrator (*g*). Where a settlement is created by the will of, or otherwise arises in consequence of the death of, a sole registered proprietor of land, it is the duty of his personal representatives to apply for the registration of the person entitled to be registered as proprietor, and for the entry on the register of proper

(*a*) *Ante*, p. 549.
(*b*) Stat. 60 & 61 Vict. c. 65, s. 8.
(*bb*) L. T. R. (1898) 200.
(*c*) On the death of one of several joint proprietors, his name is, on production of evidence of his death, to be withdrawn from the register; L. T. R. (1898) 136.
(*d*) Stats. 38 & 39 Vict. c. 87, ss. 41, 42: 60 & 61 Vict. c. 65, ss. 3, 4 (3), 6 (4, 5); L. T. R. (1898) 128—137.
(*e*) Stat. 38 & 39 Vict. c. 87, s. 42; L. T. R. (1898) 128, 129.
(*f*) Stat. 60 & 61 Vict. c. 65, ss. 3, 4; L. T. R. (1898) 130.
(*g*) *Ante*, pp. 217—219.

restrictions on inhibitions (*h*). Where the deceased person was a tenant for life registered as proprietor of settled land (*i*), it is the duty of the trustees of the settlement to apply for registration of the successor under the settlement as proprietor, with the necessary restrictions or inhibitions (if any) (*k*); and on the application of the trustees, such successor may be registered accordingly (*l*). If the trustees neglect to make such application, or there are no such trustees, any person interested under the settlement may apply for the registration of a new proprietor, and on inquiry by the registrar into the terms of the settlement, and after notice given to the trustees (if any) and the succeeding tenant for life, and such other persons as the registrar shall think fit, the new proprietor may be entered, with such restrictions and inhibitions as are proper in the circumstances of the case (*m*). Provision is also made for the registration, on the bankruptcy of the registered proprietor of any registered land or charge, of the official receiver or other trustee for the time being in the bankruptcy as proprietor in his place; and for the registration of the official receiver or other trustee, in whom the land or charge has become vested under a scheme of arrangement approved by a Court having jurisdiction in bankruptcy (*n*). Any person registered in the place of a deceased or bankrupt proprietor shall hold the land or charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests or equities subject to which the deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall in all respects, and in particular as respects any registered

Position of person registered in place of deceased or bankrupt proprietor.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 6 (5); L. T. R. (1898) 131.
(*i*) *Ante*, p. 625.
(*k*) Stat. 60 & 61 Vict. c. 65, s. 6 (4).
(*l*) L. T. R. (1898) 132—134.
(*m*) L. T. R. (1898) 135.
(*n*) Stat. 38 & 39 Vict. c. 87, ss. 43, 47; L. T. R. (1898) 138—144; *ante*, pp. 271, 272.

dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration (*o*).

Transfers and charges before registration.

Where a person on whom the right to be registered as proprietor of land or of a charge has devolved by reason of the death or bankruptcy of the registered proprietor, or has been conferred by an instrument of transfer or charge in accordance with the Acts, desires to transfer or charge the land or to deal with the charge before he is himself registered as proprietor, he may do so by an instrument in the same form as is required for a disposition by a registered proprietor (*p*); but no registration of such instrument shall be made until the person executing the same has been registered as proprietor, or his right to be so registered has been shown to the satisfaction of the registrar. Subject to the provisions of the Act of 1875 with regard to registered dealings for valuable consideration (*q*), a transfer or charge so made shall have the same effect as if the person making it were registered as proprietor (*r*).

Notice of trusts.

Neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust, express, implied or constructive; and references to trusts shall, as far as possible, be excluded from the register (*s*).

Evidence of title on sale of registered land.

A purchaser of registered land shall not require any evidence of title except (1) the evidence to be obtained from an inspection of the register or of a certified copy of, or extract from, the register; (2) a statutory declaration as to the existence or otherwise of matters which are declared by sect. 18 of the Act of 1875 and by the Act of 1897 not to be incumbrances (*t*); (3) if the

(*o*) Stat. 38 & 39 Vict. c. 87, s. 46.
(*p*) *Ante*, p. 627.
(*q*) *Ante*, pp. 628, 629.
(*r*) Stat. 60 & 61 Vict. c. 65, s. 9 (6); L. T. R. (1898) 153, 154.
(*s*) Stat. 60 & 61 Vict. c. 65, First Schedule, replacing 38 & 39 Vict. c. 87, s. 83 (1).
(*t*) *Ante*, p. 622, n. (*z*).

proprietor of the land is registered with an absolute title, and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances or evidence of their discharge from the register; (4) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right or interest excluded from the effect of the registration (*u*) as a purchaser would be entitled to if the land were unregistered; (5) if the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land (*x*) as the purchaser would be entitled to if the land were unregistered. Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser. In the absence of special stipulation, a vendor of land registered with an absolute title shall not be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration (*y*), and the implied covenants under sect. 7 of the Conveyancing and Law of Property Act, 1881 (*z*), shall be construed accordingly (*a*).

Succession and estate duty charged

On every application to register land with an absolute title, or to register a transmission of land, the registrar

(*u*) See *ante*, p. 624.
(*x*) See *ante*, p. 624.
(*y*) See *ante*, pp. 624, 625.
(*z*) *Ante*, pp. 590, 591, 603, 607.
(*a*) Stat. 60 & 61 Vict. c. 65, s. 16.

on registered land.

shall inquire as to succession duty and estate duty (*b*); and if it appears that there is, or is capable of arising, any such liability to succession duty or estate duty as would affect the purchaser from the person to be registered as proprietor if the land were unregistered (*b*), the registrar shall enter notice of the liability on the register in the prescribed manner (*d*). Succession duty and estate duty shall not (a) unless so noted on the register, or (b) unless in the case of a possessory title the liability to the duty was, at the date of the original registration of the land, subsisting or capable of arising, or (c) unless in the case of a qualified title the liability to the duty was included in the exceptions made on such original registration of the land (*e*), affect a *bonâ fide* registered purchaser for full consideration in money or money's worth, although he may have received extraneous notice of the liability in respect thereof (*f*).

Annexation of conditions to registered land.

Provision is made for the registration, as annexed to any registered land, of a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or of any other restrictive condition capable of affecting assigns, by way of notice (*g*); and on registration of such a condition the proprietor and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice thereof. Any such condition may, however, be modified or discharged by order of the Court, on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the enforcement of such condition (*h*).

(*b*) *Ante*, pp. 236, 257—260, 406, 407.

(*d*) See L. T. R. (1898) 171—174.

(*e*) *Ante*, p. 620.

(*f*) Stat. 60 & 61 Vict. c. 65, s. 13. These provisions do not, it will be observed, apply to registered charges: but the above-mentioned provisions of sect. 18 of the Act of 1875 with regard to succession duty apply to registered charges; *ante*, p. 623, n.; stat. 38 & 39 Vict. c. 87, s. 83 (8).

(*g*) *Ante*, p. 185.

(*h*) Stat. 38 & 39 Vict. c. 87, s. 84, amended by 60 & 61 Vict. c. 65, First Schedule.

With respect to the notices, cautions, inhibitions and restrictions, by which the rights of persons entitled to any unregistered estates or interests in registered land may be protected (*i*):—Provision is made, as we have seen (*k*), for entry in the register of notice of incumbrances prior to registration (*l*) of such liabilities, rights and interests as are by the Acts declared not to be incumbrances (*m*), and of a deposit of the land certificate or a certificate of charge. Besides this, any lessee or other person entitled to or interested in a lease or an agreement for a lease of registered land, where the term granted is for or determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with the lease or agreement, may apply for registration of notice of the lease or agreement; and when such notice is registered, every registered proprietor of the land, and every person deriving title through him, except proprietors of incumbrances registered prior to the registration of such notice, shall be deemed to be affected with notice of the lease or agreement as an incumbrance on the land in respect of which the notice is entered (*n*). Such notice, however, cannot be registered without the concurrence of the registered proprietor of the land, except under an order of the Court (*o*). Any person entitled to an estate in dower (*p*) or by the curtesy (*q*) in any registered land may apply for registration of notice of such estate; and such registration shall be made, if the registrar shall be satisfied with the applicant's title to such estate; and such estate, when so registered, shall be an incumbrance

Notices, cautions, inhibitions and restrictions.

Notice of lease or agreement for lease.

Notice of estate in dower or by curtesy.

(*i*) *Ante*, p. 628.

(*k*) *Ante*, pp. 622 & n. (*z*), 634.

(*l*) Any person entitled to such an incumbrance may apply to be registered as the proprietor thereof; L. T. R. (1898) 121—123. As to notification of the cessation of such incumbrances, see stat. 38 & 39 Vict. c. 87, s. 19; L. T. R. (1898) 179, 180.

(*m*) L. T. R. (1898) 171—178.

(*n*) Stat. 38 & 39 Vict. c. 87, s. 50; see L. T. R. (1898) 166—169; L. T. R. (1899) 7.

(*o*) Sect. 51.

(*p*) *Ante*, p. 320.

(*q*) *Ante*, pp. 300, 306, 309, 311.

appearing on the register, and shall be dealt with accordingly (*r*).

Caution against registered dealings with registered land.

Any person interested under any unregistered instrument or as a judgment creditor, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge with the registrar a caution against registered dealings therewith (*s*), the effect of which is that the registrar shall not without the cautioner's consent register any dealing with such land or charge until he has served notice upon the cautioner, warning him that his caution will cease to have effect after the expiration of the time (*t*) mentioned in the notice, and such time has expired (*u*). The cautioner, if he desires further to restrain any registered dealing with the land or charge, should apply for an inhibition to that effect. A caution may also be lodged against the registration of any land, which is not already registered, by any person having or claiming such an interest in the land as entitles him to object to any disposition thereof being made without his consent (*x*). The effect of such a caution is that registration shall not be made of such land until notice has been served on the cautioner to appear and oppose such registration, and the prescribed time (*y*) has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, which may last happen (*z*). Any person who lodges a caution, whether against registered dealings or registration, without reasonable cause, is liable to

Caution against registration of unregistered land.

(*r*) Sect. 52.

(*s*) Provided that a person interested under a lease or an agreement for a lease, or entitled to an estate in dower or by the curtesy, of which notice has been registered (*ante*, p. 639), shall not be entitled to a caution in respect thereof; stat. 38 & 39 Vict. c. 87, s. 53; see L. T. R. (1898) 188, 189.

(*t*) Fourteen days, as a rule; L. T. R. (1898) 190.

(*u*) Sect. 54; see ss. 55, 64; L. T. R. (1898) 190, 191.

(*x*) Stat. 38 & 39 Vict. c. 87, s. 90; see s. 61; L. T. R. (1898) 74—77.

(*y*) Fourteen days, as a rule; L. T. R. (1898) 77.

(*z*) Stat. 38 & 39 Vict. c. 87, s. 62; see s. 64.

make compensation to any person who has sustained damage thereby (*a*).

Inhibitions.

The Court, or, subject to an appeal to the Court, the registrar, upon the application of any person interested in relation to any registered land or charge, may, after directing such inquiries (if any) to be made, and notices to be given, and hearing such persons as the Court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, any dealing with any registered land or registered charge (*b*).

Restrictions.

Where the registered proprietor of any land or charge is desirous to place restrictions on transferring or charging such land or charge, such proprietor may apply to the registrar to make an entry in the register that no transfer shall be made of, or charge created on, such land or charge, unless the following things, or such of them as the proprietor may determine, are done (that is to say): (1) unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar; (2) unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge; (3) unless some such other matter or thing is done as may be required by the applicant and approved by the registrar (*c*). The registrar thereupon makes a note of such directions on the register, and then no transfer shall be made or charge created except in conformity with such directions, which may, however, be at any time withdrawn or modified at the instance of all persons for the time being appearing by

(*a*) Sects. 56, 63.

(*b*) Stat. 38 & 39 Vict. c. 87, s. 57; see L. T. R. (1898) 194, 195.

(*c*) Stat. 38 & 39 Vict. c. 87, s. 58, as amended by 60 & 61 Vict. c. 65, First Schedule; see L. T. R. (1898) 196.

the registry to be interested therein, and are subject to be set aside by order of the Court (*d*). As we have seen (*e*), on the registration of settled land, such restrictions or inhibitions are to be entered on the register as may be prescribed or expedient. Thus where the tenant for life is registered as proprietor and there are trustees for the purposes of the Settled Land Acts (*f*), restrictions are entered that until further order no transfer of the land is to be made except on sale or exchange, and the purchase-moneys on sale are to be paid to such trustees or into Court, and no sale is to be made of the principal mansion house and lands usually occupied therewith without the consent of the trustees or an order of the Court (*g*); and an inhibition is entered that on the death of the tenant for life no entry is to be made until further order (*h*). Where two or more persons apply to be registered as joint proprietors of land or of a charge, an entry is to be made in the register that when their number is reduced to one, no registered disposition of the land or charge shall be made except under an order of the registrar after an inquiry into title or an order of the Court. But such an entry need not be made if satisfactory evidence is produced that they are entitled for their own benefit or upon a trust under which a sole surviving trustee has power to dispose of the land or charge (*i*).

Restriction on entry of joint proprietors.

Subject to any estates or rights acquired by registration in pursuance of the Acts (*k*), where any Court of competent jurisdiction has decided that any person is entitled to any estate, right or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the register is required, such Court may make an order

Rectification of the register.

(*d*) Stat. 38 & 39 Vict. c. 87, s. 59.
(*e*) *Ante*, p. 625.
(*f*) *Ante*, p. 119.
(*g*) *Ante*, p. 121.
(*h*) L. T. R. (1898) 71.
(*i*) Stat. 38 & 39 Vict. c. 87, s. 83 (3), as amended by 60 & 61 Vict. c. 65, First Schedule; L. T. R. (1898) 185—187.
(*k*) *Ante*, pp. 622—629.

directing the register to be rectified in such manner as it thinks just (*l*). Subject to any estates or rights acquired by registration in pursuance of the Acts (*m*), if any person is aggrieved by any entry made, or by the omission of any entry from the register under the Acts, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry, omission, default or delay may apply to the Court in the prescribed manner for an order that the register may be rectified, and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register (*n*). Subject to the provisions of the Acts with respect to registered dispositions for valuable consideration (*o*), any disposition of land, or of a charge on land, which, if unregistered, would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner (*p*). Where any error or omission is made in the register, or where any entry in the register is made or procured by, or in pursuance of, fraud or mistake, and the error, omission or entry is not capable of rectification under the Act of 1875, any person suffering loss thereby shall be entitled to be indemnified in the manner provided in the Act of 1897 (*q*). Provided that where a registered disposition would, if unregistered, be absolutely void, or where the effect of such error, omission or entry would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity (*r*). A person shall not be

Fraudulent dispositions.

Right to indemnity in certain cases.

(*l*) Stat. 38 & 39 Vict. c. 87, s. 95.
(*m*) *Ante*, pp. 622—629.
(*n*) Stat. 38 & 39 Vict. c. 87, s. 96.
(*o*) *Ante*, pp. 627—630.
(*p*) Stat. 38 & 39 Vict. c. 87, s. 98.
(*q*) Stat. 60 & 61 Vict. c. 65, s. 7 (1).
(*r*) Sect. 7 (2).

entitled to indemnity for any loss where he has caused, or substantially contributed to the loss by his act, neglect or default; and the omission to register a sufficient caution, notice, inhibition or other restriction to protect a mortgage by deposit or other equitable interest, or any estate or interest created under sect. 49 of the Act of 1875 (*s*), shall be deemed neglect within the meaning of this sub-section (*t*). Where the register is rectified under the Act of 1875, by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of, and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section (*u*). The registrar may, if the applicant desires it, and subject to an appeal to the Court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the Court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the Court shall consider that the appeal is unreasonable (*x*). Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect or default (*y*). A claim for indemnity under this section shall be deemed a simple contract debt, and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim. This section shall apply to the Crown in like manner as it applies to a private person (*z*). The Act of 1897 (*a*) established

(*s*) *Ante*, p. 628.
(*t*) Sect. 7 (3).
(*u*) Sect. 7 (4).
(*x*) Sect. 7 (5).
(*y*) Sect. 7 (6).
(*z*) Sect. 7 (7).
(*a*) Sect. 21.

an insurance fund for providing indemnity to persons injured in the manner above mentioned.

As to requiring a title to registered land by adverse possession.

A title to registered land adverse to, or in derogation of, the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly (*b*). Provided that where a person would, but for the provisions of the Act of 1875 or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register under sect. 95 of the Act of 1875 (*c*), and on such application the Court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the Acts, order the register to be rectified accordingly. And provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only (*d*), any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place (*e*).

The register, how divided.

The register of each title consists of three portions: the Property Register, the Proprietorship Register, and the Charges Register (*f*).

The Property Register.

The Property Register contains the description of the land comprised in the title, with a reference to the filed plan thereof, and such notes as have to be entered relating to the ownership of the mines and minerals; to exemption from any of the liabilities, rights and interests mentioned in sect. 18 of the Act of 1875, as amended by the Act of 1897 (*g*); to easements, rights to profits *à prendre*, conditions and covenants for the benefit of the land, and other like

(*b*) See *ante*, pp. 561—566.
(*c*) *Ante*, p. 642.
(*d*) See *ante*, pp. 624, 625.
(*e*) Stat. 60 & 61 Vict. c. 65, s. 12.
(*f*) L. T. R. (1898) 2.
(*g*) *Ante*, p. 622, n. (*z*).

The Proprietorship Register.

matters ; and as to the value of the land (*h*). The Proprietorship Register states whether the title is absolute, qualified or possessory, and contains the name, address and description of the proprietor of the land, and cautions, inhibitions and restrictions affecting his right of disposing thereof (*i*).

The Charges Register.

The Charges Register contains incumbrances prior to registration, charges and other incumbrances (including notices of leases and of estates in dower or by the curtesy (*k*)), and such notes as have to be entered relating to covenants, conditions and other rights adversely affecting the land (*l*) : and also contains all such dealings with registered charges and incumbrances as are capable of registration (*m*). In the case of leasehold land, a reference to the registered lease, and such particulars thereof, and of the exceptions or reservations therefrom (if any), as the applicant may desire and the registrar approve, and a reference to the lessor's title, if registered, are entered in the Property Register (*n*). The title to each registered property bears a distinguishing number (*o*). In districts where registration of title is compulsory, the registers of the title are bound in volumes according to the parishes where the lands registered lie (*p*).

Index maps.

There are also kept in the registry an index map showing the position and extent of every registered property, and a separate index map of leasehold titles and lands affected by the registration of incorporeal hereditaments, an index of proprietors' names (*q*), and a list of pending applications to enter land in the register (*r*).

List of pending applications.

Of these the index maps and list of pending applications are open to public inspection : but the index of proprietors' names is open to the inspection of the registered proprietors only ; provided that if any person shall satisfy the

(*h*) L. T. R. (1898) 3.
(*i*) Rule 6.
(*k*) *Ante*, p. 639.
(*l*) *Ante*, p. 638.
(*m*) L. T. R. (1898) 7.
(*n*) Rule 5.
(*o*) Rule 2.
(*p*) Rule 9.
(*q*) Rule 12.
(*r*) Rule 13.

registrar that he is interested generally in the property of any proprietor—for instance, as his trustee in bankruptcy or executor or administrator—he may inspect that index also (*s*). No entry in the register is to be inspected except by or under the authority of some person interested in the land or charge to which the entry refers (*t*). The ordnance map is the basis of all registered descriptions of land (*u*). A plan of the land registered is required to be filed on registration (*x*). And instruments of transfer are required to contain a description of the land transferred sufficient to identify the same on the ordnance map (*y*).

Description of registered land.

The provisions of the Act of 1897 as to compulsory registration have been stated in earlier parts of this book (*z*). The Act provides (*a*) that nothing therein shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run (*b*), or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed with and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor (*c*) and included in a sale of a manor as such. Where the sale of lands situate in a district where registration is compulsory is intended to be immediately followed by a mortgage thereof made by the purchaser, the carrying out of these transactions is facilitated by a rule providing that, when a conveyance on sale of land so situate, and a disposition thereof by the purchaser are delivered for registration

Compulsory registration.

Exceptions therefrom.

Sale followed by mortgage of land in district where registration is compulsory.

(*s*) Rule 14.
(*t*) Stat. 60 & 61 Vict. c. 65. s. 22 (7); see L. T. R. (1898) 222 *sq.*
(*u*) Stat 60 & 61 Vict. c. 65, s. 14 (2); L. T. R. (1898) 209 *sq.*
(*x*) L. T. R. (1898) 2.
(*y*) L. T. R. (1898) 79 *sq.*, 146.
(*z*) *Ante*, pp. 207, 493, 504, 510.
(*a*) Stat. 60 & 61 Vict. c. 65. s. 24.
(*b*) *Ante*, pp. 493, 504, 510.
(*c*) Lands held by copyholders fall within this description, as regards the lord's interest therein: *ante*, p. 451; but lands held of the lord of a manor by free tenure are not parcel of the manor: *ante*, pp. 409, 410; Williams on Seisin, 30.

within fourteen days after the date of the conveyance, the disposition shall have the same effect in every respect as if it had been executed subsequently to the registration of the purchaser as proprietor of the land. If the land is leasehold, the words "conveyance on sale" shall apply to a grant or assignment of a lease or sub-lease, and the word "purchaser" shall apply to a grantee, lessee or assignee (*d*).

Removal of land from the register.

Land not situate in a district where the registration of title is compulsory (*e*) may be removed from the register by the registered proprietor thereof with the consent of the other persons (if any) for the time being appearing by the register to be interested therein, and on delivering up the land certificates and certificates of charge (if any) (*f*). If any land so removed is situate within the jurisdiction of the Middlesex or Yorkshire registries (*g*), it will again become subject to such jurisdiction as from the date of removal (*h*).

The above account gives the main provisions of the Acts; but it is impossible within the limits of the present work to discuss the working of the Acts in practice or the questions which may arise thereon. The reader will observe, however (*i*), that, outside of the statutory methods of disposition by way of registered transfer and registered charge, registered land is left to be disposed of by the same modes of assurance as are applicable to unregistered land. Settlements, therefore, leases and wills of registered land must be made in the same forms as before (*k*); but settlements may be accompanied by an instrument of transfer for effecting the registration, as proprietor or proprietors of the settled land, of the tenant for life or other persons entitled to

(*d*) L. T. R. (1898) 78; L. T. R. (1899) 5.
(*e*) *Ante*, p. 208.
(*f*) Stat. 60 & 61 Vict. c. 65, s. 17.
(*g*) See *ante*, pp. 206, 208.
(*h*) Sect. 17 (3).
(*i*) See *ante*, p. 628.
(*k*) *Ante*, pp. 238, 489—492.

be so registered (*l*), with the necessary restrictions or inhibitions. With respect to mortgages of registered land, the statutory charge with power of sale (*m*) seems to form an effective security so long as the land charged does not depreciate in value to such an extent that the amount charged cannot be realized by an exercise of the power of sale. If the chargee should be driven to exercise his remedies by foreclosure or entry into possession (*n*), he will be at a disadvantage as compared with the mortgagee under a mortgage of land in the old established form (*o*). As we have seen (*p*), the mortgagee under a conveyance by way of mortgage in the old form has the legal estate in the mortgaged lands from the time of the mortgage. On foreclosure, therefore, he retains the legal estate which he had before, discharged, however, from the mortgagor's equity of redemption (*q*). If he enter into possession of the mortgaged lands and remain in possession for twelve years without giving any written acknowledgment on the mortgagor's title or right to redemption, the equity of redemption will *ipso facto* be extinguished, notwithstanding any disability on the part of the mortgagor, or any person claiming under him (*r*). But a chargee under a statutory charge on registered land has not, it appears, any *estate* therein, though he has the legal *interest* given by the charge—that is, a lien on the lands at law for the amount of money secured. On foreclosure, therefore, it seems that he can obtain no more than the equitable estate in the land charged, though he will apparently obtain the legal estate on subsequent registration of himself as proprietor of the land (*s*). If he should be obliged to have recourse to his remedy by entry upon the land charged, he is not as the mortgagee taking

Mortgages of registered land.

(*l*) *Ante*, pp. 617—622; L.T.R. (1898) 81.
(*m*) *Ante*, pp. 627, 630—632.
(*n*) *Ante*, pp. 539, 540.
(*o*) *Ante*, pp. 532, 610.
(*p*) *Ante*, p. 533.
(*q*) *Ante*, pp. 539, 540.
(*r*) *Ante*, pp. 533, 534, 540, 545.
(*s*) *Ante*, pp. 631, 632.

possession of his own fee simple; he has nothing but the statutory right to enter and hold possession (*t*), and his interest when he has so taken possession seems to be something like the estate of a tenant by *elegit* (*u*). As regards the barring of the equity of redemption by the Statute of Limitations, that does not take place, as in the case of a mortgagee, immediately he has completed twelve years' possession and without any further act on his part (*x*); but the chargee, who has been for twelve years in possession, must apply to the Court on this ground for an order for rectification of the register (*y*). And it does not appear that he can claim such an order as his undoubted right; the granting thereof appears to be in the judicial discretion of the Court, which is to be exercised "subject to any estates or rights acquired by registration for valuable consideration in pursuance of the Acts" (*z*). And in any case the chargee would appear to be saddled with the burden of proof that he is entitled to have the register rectified as he desires, and he would have to pay the costs of his application out of his own pocket. For these reasons it seems desirable for a person advancing money on the security of registered freehold land, unless he is allowing an ample margin for possible depreciation in value, to insist on being registered as the proprietor of the land. Such a transaction may be carried out by a mortgage deed in the old form, accompanied by an instrument of transfer from the mortgagor to the mortgagee, under which the mortgagee is registered as the proprietor, the mortgagor's interest being protected by a caution lodged by him (*a*). In the case of registered leasehold land, the statutory charge is convenient, as the chargee, not taking the mortgagor's estate, does not appear to become

(*t*) *Ante*, p. 631.
(*u*) *Ante*, pp. 266, n. (*f*), 268.
(*x*) *Ante*, p. 545.
(*y*) *Ante*, p. 645.
(*z*) *Ante*, p. 645.
(*a*) See 2 Key & Elphinstone, Pres. Conv. 69, 6th ed.

liable for the rent and covenants of the lease (*b*) ; and he can dispose under his power of sale of the whole term for which the lands are leased (*c*). But as the chargee is neither assignee nor underlessee of the land charged, it is doubtful whether, in the case of a breach committed by the mortgagor of any covenant contained in the lease, the chargee would have any *locus standi* to apply to the Court for relief against the forfeiture which might be so incurred (*d*). On this account it is advisable for a mortgagee of registered leasehold land to take an underlease thereof made by deed in the ordinary form, as well as a registered charge thereon (*e*).

Summary.

The reader will have seen that the modern law of real property is a system of great complexity, and the diverse rules which it contains are not to be understood without a knowledge of their origin and history. But the complex nature of the modern law, which makes the student's task so difficult, is not owing, as has been commonly supposed, to the feudal system or to the subtlety of the judges who formulated the early common law with regard to land. It is in a great measure due to the action of the English landowners, who have from the earliest times been possessed with the idea of assuring their lands to themselves and their descendants by means of family settlements, and have in modern times desired to effect this object without losing the benefit of the powers of alienation incident to full ownership. The influence of our earliest lawyers made

(*b*) *Ante*, pp. 548, 649.
(*c*) *Ante*, p. 631.
(*d*) See *ante*, p. 500 and n. (*o*).
(*e*) See *ante*, p. 548. Such an underlease is not capable of registration ; *ante*, p. 617 : but notice thereof may be registered ; *ante*, p. 639 ; see L. T. R. (1899) 7. It is not desirable that such an underlease should be contained in the instrument of charge. For all documents on which any entry in the register is founded are, as a rule, required to be retained in the registry ; L. T. R. (1898) 162. And, although provision is made for the issue of office copies of any document in the registry to any person entitled to inspect the same (r. 229), it has not been provided that such copies shall be evidence for all purposes.

for simplicity in law. Thus we have seen (*f*) that in this country the feudal rules of landholding, which allowed to the heir a distinct interest in lands given to a man and his heirs and restricted alienation on the part of the donee under such a gift except with the consent of both donor and heir, were superseded as early as the thirteenth century by the judge-made law that the heirs shall take nothing under such a gift, and the words of gift to the heir shall take effect only to confer an estate in fee simple on the ancestor. The conception of an estate in fee simple in land being thus accomplished, it was settled partly by decision and partly by statute in the manner already related (*g*) that the right of free alienation is inseparably incident to such an estate. At common law, too, the conveyance of lands was a matter of great simplicity. Actual delivery of possession being the essential part (*h*), it could only be effected between living and ascertained persons, certain feoffor and certain feoffee (*i*), and by way of present and not of future transfer (*k*). The landowners' passion for settlement first appears, before the statute *De Donis* (*l*), in elaborate limitations by way of successive conditional fees (*m*). Then, when their wishes had been defeated by the action of the judges in allowing free alienation on the birth of issue to tenants under conditional gifts (*n*), we find strict settlement favoured by the statute *De Donis* (*o*) passed at the instance of the barons. We next observe the result of landowners' determination to make settlements, to avoid creditors' claims, and to make wills in the practice, which prevailed from the fourteenth to the sixteenth century, of conveying lands to feoffees to uses (*p*). And in the

(*f*) *Ante*, pp. 66—68.
(*g*) *Ante*, pp. 67—72, 81, 82.
(*h*) *Ante*, p. 144.
(*i*) See the authorities cited, *ante*, p. 346, 347, nn. (*d*, *e*, *f*).
(*k*) *Ante*, pp. 351, 352.
(*l*) 13 Edw. I. c. 1 ; *ante*, p. 93.
(*m*) See the authorities cited, *ante*, pp. 92, n. (*r*), 166, n. (*o*).
(*n*) *Ante*, p. 92.
(*o*) 13 Edw. I. c. 1 : *ante*, p. 93.
(*p*) *Ante*, pp. 166, 176.

relief accorded by the Chancellor against a breach of confidence on the part of such feoffees we find the origin of the jurisdiction of Courts of Equity in respect of trusts, which now occupies such an important place in our legal system (*q*). The practice of conveying lands to feoffees to uses was, as we have seen, effectually checked by the Statute of Uses (*r*): but the desire of landowners to maintain a system of family settlement, stimulating the ingenuity of their legal advisers, again took effect in the plan of settling lands on living persons for life, with remainder to their unborn children successively in tail (*s*). This manner of disposition could never have prevailed but for the strange decision of the Courts in allowing as valid a gift of lands to an unascertained or unborn person by way of remainder (*t*). This seems to be a distinct departure from sound principle, and appears to have been so regarded by one of the greatest masters of our law (*u*). English law does not admit of gifts to the dead; that was well settled, even the civilly dead (*v*) being excluded from taking (*x*). How then could a gift to the unborn be held to be valid? The explanation seems to be that this radical change in the law of property was inadvertently introduced under cover of the approval of a gift in remainder to the *heir* of a living person (*y*). Now we have seen that, although the English law deprived the heir of the *interest* which he once took under a gift of land to a man and his heirs, it left him the possibility or expectation of inheritance (*z*). And in not rejecting a gift by way of contingent remainder to the heir of a living person, the judges merely allowed him the like

(*q*) *Ante*, pp. 167, 168, 177 *sq.*

(*r*) Stat. 27 Hen. VIII. c. 10; *ante*, pp. 171, 176.

(*s*) *Ante*, pp. 112, 176.

(*t*) *Ante*, p. 347.

(*u*) Littleton, writing *after* this decision, nevertheless lays down the old rule as to gifts by way of remainder; *ante*, p. 347, nn. (*f*, *g*).

(*v*) *Ante*, p. 113.

(*x*) Litt. s. 200; Co. Litt. 2a, 3b; 1 Jarm. Wills, 207, 5th ed.

(*y*) *Ante*, p. 347.

(*z*) *Ante*, p. 68 and n. (*l*).

possibility (*a*) of succeeding on the death of the particular tenant seised as he would have enjoyed under a gift to the ancestor and his heirs. However this may have been, when limitations to a man's first and other unborn sons came to be substituted for gifts to his heirs, the judges concerned in interpreting these limitations had not the strength of mind to return to the principles established by their early predecessors. But the recognition of the unborn as persons capable of receiving a direct though future gift of lands or goods is really the principal cause of the complexity and difficulty of the English law of property. It is mainly owing to this that the necessity arose for limiting the exercise of the power of disposition by the rule against perpetuities and the rules governing the limitation of successive contingent remainders (*b*). In upholding gifts to unborn sons, however, the judges did but give effect to limitations penned at the instance of land-owners (*c*); in fact, they merely gave expression to men's natural desires to secure an inalienable provision for their children (*d*). In this way the foundation of the present system of settlement was laid, but it was not firmly built upon until in the time of the Commonwealth means of preventing the destruction of contingent remainders were discovered in the limitation

(*a*) *Ante*, pp. 348, 357.

(*b*) *Ante*, pp. 395—405; see L. Q. R. xiv. 238—242.

(*c*) See L. Q. R. xiii. 4—6, xiv. 238, 239.

(*d*) *Ante*, p. 349. It should not be forgotten that, by the time that it had become a general custom amongst well-to-do people to make settlements of lands or other property on their unborn children, there had been established in our law a freedom of alienation, especially by will, which is without parallel in other legal systems. As regards chattels, particularly, English law had abandoned the right, once recognized as indefeasible, of a deceased owner's wife and children therein in favour of an absolute power of testamentary disposition; *ante*, p. 20, n. (*f*). But this extreme freedom of alienation has in a manner outrun the natural instincts of mankind. These prompt men to secure for their offspring by settlement the like inalienable provision as is in other legal systems given by law. So we pay for the wide power of disposition annexed in English law to ownership with the intricate rules relating to dispositions in favour of the unborn.

to trustees to preserve them (*e*). Henceforward contingent remainders to unborn sons were practically raised to the level of indefeasible interests. And the firm establishment of the law of executory devises (*f*) added to the facility of assuring lands for the benefit of generations yet unborn. From the latter part of the seventeenth century settlement flourished vigorously both by deed and will; and conveyancers introduced and in the course of the eighteenth century perfected the ingenious device of the conveyance of land by means of powers of appointment operating through the effect of the Statute of Uses, thus enabling lands placed in settlement to be effectually leased, sold or mortgaged, notwithstanding that the inheritance thereof had been limited to unborn persons as purchasers (*g*). As we have seen (*h*), the same object is now attained by the exercise of the powers given by the Settled Land Acts. And the design of these Acts is merely to further the alienation of lands without interfering with the custom of settlement. They have conferred a substantial benefit upon the owners of settled land, but they certainly do not simplify the law. Indeed, another main reason of the intricacy of the present land laws is the manner in which they have been altered by statute during the last seventy years. The real property legislation of 1833 (*i*) not only introduced beneficial reforms in practice, but also rendered obsolete a great deal of the previous law. Thus practitioners are relieved from the necessity of acquainting themselves with the learning of fines and recoveries or of real actions (*k*). Subsequent legislation, however, has almost without

(*e*) *Ante*, pp. 363, 364; see Williams on Seisin, 193.

(*f*) *Ante*, pp. 389, 390.

(*g*) *Ante*, pp. 117 and n. (*l*), 382—385.

(*h*) *Ante*, p. 385.

(*i*) *Ante*, pp. 64, n. (*g*), 98, 99, 221, 318.

(*k*) Of course, acquaintance with the previous law was necessary for some time after, in order to be able to pronounce upon the validity of past transactions.

exception proceeded on the lines of removing particular instances of hardship without regard to legal principle. The consequence of this is that the rules now in force are nothing but a series of anomalies, and in order to understand them the student is obliged to devote his mind in the first instance to the apprehension of the principles which the rules infringe, and when he has succeeded in this he has to encounter the labour of extracting the meaning of a vast number of legislative enactments from the involved and intricate language in which they are usually expressed (*l*). Each successive reform has added something to the burden of knowledge which the student must painfully acquire, but has taken nothing away. The Land Transfer Act, 1897 (*m*), affords an extreme instance of the method which the Legislature has pursued. The devolution of a dead man's real estate to his executors or administrators is of great practical convenience, as enabling sales to pay debts or for like purposes to be readily effected (*n*). But except for the purposes of the payment of debts, the laws of succession after death still remain widely different in the case of realty and personalty. The heir's title to succeed to the enjoyment of his ancestor's real estate has not been abolished (*o*); and the student is left to digest the apparent paradox that, to confer on a man such an estate in lands as shall devolve to his *executors*, the essential thing is to give the lands to him and his *heirs* (*p*). Again, the registration of the title to land, which the same Act has made compulsory on sale in certain districts, is an advantage to landowners in so far as it saves them the expense of investigation of title on every sale or mortgage. But

(*l*) Good examples are found in the doctrines of the destructibility of contingent remainders and of the indivisibility of a condition of re-entry, and the statutes which have partially removed them; *ante*, pp. 353, 354, 359, 362, 501—504.

(*m*) Stat. 60 & 61 Vict. c. 65; *ante*, pp. 213, 218, 277, 282, 311, 344, and elsewhere.

(*n*) *Ante*, p. 215.

(*o*) *Ante*, pp. 29, 213, 221.

(*p*) *Ante*, pp. 202, 203 and n. (*n*).

when the reader finds that under the law so introduced lands may be held and disposed of for all manner of unregistered estates and interests as well as for the estates and by the means of conveyance recognized on the register (*q*), he will note a likely source of further confusion. The difference between legal and equitable estates (*r*) in land is sufficiently puzzling to a student: but we are here threatened with a new distinction, not necessarily coinciding with that difference, between registered and unregistered estates. Those who have now to learn and those who have to teach the law of real property can best appreciate the pressing need for reform which shall not merely change but really simplify the law. But it is not likely that this will be effected unless the same conditions can be again secured as resulted in the passing of the Fines and Recoveries Act (*s*). The author of that statute was at once a lawyer well versed in conveyancing practice, a master of legal principles, and a consummate draftsman (*t*); and his work was not marred by what are called "amendments" made in its passage through the Legislature.

(*q*) *Ante*, pp. 623, 626, 628, 629, 648.

(*r*) *Ante*, pp. 170, 178, 179, 194.

(*s*) Stat. 3 & 4 Will. IV., c. 74; *ante*, p. 98.

(*t*) It may be related, *pour encourager les autres*, that Mr. Brodie's eminent public services in drafting this Act were rewarded by no remuneration at all. Besides which, on account of the time he had to give to the work, his practice sustained a blow from which it never completely recovered; see Joshua Williams's Letters to John Bull, 34, 35.

APPENDIX (A).

Referred to, pp. 200, 381, 598, 608.

Bargain and Sale, or Lease for a Year. (See p. 199.)

THIS INDENTURE made the first day of January (*a*) [in the third year of our Sovereign Lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1840 — Date.

BETWEEN A. B. of Cheapside in the city of London Esquire of the one part and C. D. of Lincoln's Inn in the county of Middlesex Esquire of the other part — Parties.

WITNESSETH that the said A. B. in consideration of five shillings (*b*) of lawful money of Great Britain to him in hand paid by the said C. D. at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) HATH bargained and sold and by these presents DOTH bargain and sell unto the said C. D. his executors administrators and assigns — Testatum. Consideration. Bargain and sale.

ALL that messuage or tenement situate lying and being at &c. and commonly called or known by the name of &c. [*here describe the premises*] — Parcels.

TOGETHER with all and singular the houses outhouses edifices buildings barns dovehouses stables yards gardens orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands and hereditaments or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof — General words.

TO HAVE AND TO HOLD the said messuage or tenement land and hereditaments and all and singular other the premises hereinbefore — Habendum.

(*a*) The words within brackets were latterly omitted.

(*b*) *Ante*, pp. 199, 200.

bargained and sold or intended so to be with their and every of their rights members and appurtenances unto the said C. D. his executors administrators and assigns from the day next before the day of the date of these presents for and during and until the full end and term of one whole year thence next ensuing and fully to be complete and ended

Reddendum. YIELDING AND PAYING therefor the rent of one peppercorn (*c*) at the expiration of the said term if the same shall be lawfully demanded

To the intent and purpose that by virtue of these presents and of the statute for transferring uses into possession the said C. D. may be in the actual possession of the same premises and may thereby be enabled to accept and take a grant and release of the freehold reversion and inheritance of the same premises and of every part and parcel thereof to the said C. D. his heirs and assigns to the uses and for the intents and purposes to be declared by another indenture of three parts already prepared and intended to be dated the day next after the day of the date hereof

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written

The Release.

Date. THIS INDENTURE made the second day of January (*d*) [in the third year of the reign of our Sovereign Lady Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1840

Parties. BETWEEN A. B. of Cheapside in the city of London Esquire of the first part C. D. of Lincoln's Inn in the county of Middlesex Esquire of the second part and Y. Z. of Lincoln's Inn aforesaid gentleman of the third part (*e*)

Recital of the conveyance to the vendor. WHEREAS by indentures of lease and release bearing date respectively on or about the first and second days of January 1838 and respectively made or expressed to be made between E. F. therein described of the one part and the said A. B. of the other part for the consideration therein mentioned the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted with the appurtenances were conveyed and assured by the

(*c*) *Ante*, p. 326.

(*d*) The words within brackets were latterly omitted.

(*e*) The reason why Y. Z. was made a party to this deed is, that the widow of C. D., if married on or before the 1st of January, 1834, might be barred or deprived of her dower. See *ante*, pp. 380, 381. If this were not intended, the deed would have been made between A. B. of the one part, and C. D. of the other part, as in the deed given, *ante*, p. 594.

said E. F. unto and to the use of the said A. B. his heirs and assigns for ever

AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the inheritance in fee simple in possession of and in the said messuage or tenement lands and hereditaments hereinbefore referred to and hereinafter described with the appurtenances free from all incumbrances at or for the price or sum of one thousand pounds — Recital of the contract for sale.

NOW THIS INDENTURE WITNESSETH that for carrying the said contract for sale into effect and in consideration of the sum of one thousand pounds of lawful money of Great Britain to the said A. B. in hand well and truly paid by the said C. D. upon or immediately before the sealing and delivery of these presents (the receipt of which said sum of one thousand pounds in full for the absolute purchase of the inheritance in fee simple in possession of and in the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted and released with the appurtenances he the said A. B. doth hereby acknowledge and of and from the same and every part thereof doth acquit release and discharge the said C. D. his heirs executors administrators and assigns [and every of them for ever by these presents]) He the said A. B. HATH granted bargained sold aliened released and confirmed and by these presents DOTH grant bargain sell alien release and confirm unto the said C. D. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. B. in consideration of five shillings in and by an indenture bearing date the day next before the day of the date of these presents for the term of one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale and by force of the statute made for transferring uses into possession) and to his heirs (*f*) — Testatum. Consideration. Receipt. Operative words.

ALL that messuage or tenement situate lying and being at &c. commonly called or known by the name of &c. [*here describe the premises*] — Parcels.

TOGETHER with all and singular the houses outhouses edifices buildings barns dovehouses stables yards gardens orchards lights — General words.

(*f*) If the deed were dated at any time between the month of May, 1841 (the date of the statute 4 & 5 Vict. c. 21; *ante*, pp. 195, 201), and the 1st of January, 1845 (the time of the commencement of the operation of the Transfer of Property Act, *ante*, p. 201, n. (*d*)), the form would be as follows:—"He the said A. B. "DOTH by these presents (being "a deed of release made in pursuance of an Act of Parliament "made and passed in the fourth "year of the reign of her present "Majesty Queen Victoria intituled An Act for rendering "a Release as effectual for the "Conveyance of Freehold Estates "as a Lease and Release by the "same Parties) grant bargain sell "alien release and confirm unto "the said C. D. and his heirs."

As to the form in a deed of grant, see *ante*, p. 595.

easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or at any time heretofore (*g*) usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof

Estate. AND all the estate right title interest use trust inheritance property possession benefit claim and demand whatsoever both at law and in equity of him the said A. B. in to out of or upon the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be and every part and parcel of the same with their and every of their appurtenances

And all deeds. AND all deeds evidences and writings relating to the title of the said A. B. to the said hereditaments and premises hereby granted and released or intended so to be now in the custody of the said A. B. or which he can procure without suit at law or in equity

Habendum. TO HAVE AND TO HOLD the said messuage or tenement lands and hereditaments hereinbefore described and all and singular other the premises hereby granted and released or intended so to be with their and every of their rights members and appurtenances unto the said C. D. and his heirs (*h*)

Uses to bar dower. To such uses upon and for such trusts intents and purposes and with under and subject to such powers provisoes declarations and agreements as the said C. D. shall from time to time by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses direct limit or appoint And in default of and until any such direction limitation or appointment and so far as any such direction limitation or appointment if incomplete shall not extend To the use of the said C. D. and his assigns for and during the term of his natural life without impeachment of waste And from and after the determination of that estate by forfeiture or otherwise in his lifetime To the use of the said Y. Z. and his heirs during the life of the said C. D. In trust nevertheless for him the said C. D. and his assigns and after the decease of the said C. D. To the use of the said C. D. his heirs and assigns for ever

(*g*) See *ante*, p. 605.

(*h*) If C. D. was not married on or before the 1st of January, 1834, or if, having been so married, the dower of his widow should not be intended to be barred, instead of the next clause, the form would simply be "To the use of the said C. D. his heirs and assigns for ever."

AND the said A. B. doth hereby for himself his heirs executors and administrators covenant promise and agree with and to the said C. D. his appointees heirs and assigns in manner following that is to say Covenants for title.

THAT for and notwithstanding any act deed matter or thing whatsoever by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him made done or committed to the contrary (*i*) [he the said A. B. is at the time of the sealing and delivery of these presents lawfully rightfully and absolutely seised of or well and sufficiently entitled to the messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be with their appurtenances of and in a good sure perfect lawful absolute and indefeasible estate of inheritance in fee simple without any manner of condition contingent proviso power of revocation or limitation of any new or other use or uses or any other matter restraint cause or thing whatsoever to alter change charge revoke make void lessen or determine the same estate That the vendor is seised in fee.

AND THAT for and notwithstanding any such matter or thing as aforesaid] he the said A. B. now hath in himself good right full power and lawful and absolute authority to grant bargain sell alien release and confirm the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents That the vendor has a good right to convey.

AND THAT the same messuage or tenement lands hereditaments and premises with their appurtenances shall and lawfully may accordingly from time to time and at all times hereafter be held and enjoyed and the rents issues and profits thereof received and taken by the said C. D. his appointees heirs and assigns to and for his and their own absolute use and benefit without any lawful let suit trouble denial hindrance eviction ejection molestation disturbance or interruption whatsoever of from or by the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him For quiet enjoyment.

AND THAT (*k*) free and clear and freely and clearly acquitted exonerated and discharged or otherwise by him the said A. B. his heirs executors or administrators well and sufficiently saved defended kept harmless and indemnified of from and against all and all manner of former and other [gifts grants bargains sales leases mortgages jointures dowers and all right and title of dower uses trusts wills entails statutes merchant and of the staple recognizances judgments extents executions annuities legacies payments rents and arrears of rent forfeitures re-entries cause and causes of forfeiture and re-entry and of from and against all and singular other] estates rights titles For freedom from incumbrances.

(*i*) See *ante*, p. 588.

(*k*) The word *that* is here a pronoun.

charges and incumbrances whatsoever had made done committed executed or willingly suffered by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him

For further assurance.

And moreover that he the said A. B. and his heirs and all and every persons and person having or lawfully claiming or who shall or may have or lawfully claim any estate right title or interest whatsoever at law or in equity in to or out of the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances by from through under or in trust for him or them shall and will from time to time and at all times hereafter upon every reasonable request and at the costs and charges of the said C. D. his appointees heirs and assigns make do and execute or cause or procure to be made done and executed all and every or any such further and other lawful and reasonable acts deeds things grants conveyances and assurances in the law whatsoever for further better more perfectly and effectually granting releasing conveying and assuring the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents as by him the said C. D. his appointees heirs or assigns or his or their counsel in the law shall or may be reasonably advised or devised and required [so that no such further assurance or assurances contain or imply any further or any other warranty or covenant than against the person or persons who shall make and execute the same and his her or their heirs executors and administrators' acts and deeds only and so that the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable for making or doing thereof to go or travel from his her or their dwelling or respective dwellings or usual place or places of abode or residence]

In witness, &c.

On the back is endorsed the attestation and further receipt as follows:—

Signed sealed and delivered by the within-named A. B. C. D. and Y. Z. in the presence of

John Doe of London Gent.
Richard Roe Clerk to *Mr. Doe*.

Received the day and year first within written of and from the within named C. D. the sum of One Thousand Pounds being the consideration within mentioned to be paid by him to me. £1000

(Signed) A. B.

Witness *John Doe*.
Richard Roe.

APPENDIX (B).

Referred to, p. 223.

THE case of *Muggleton* v. *Barnett* was shortly as follows (*a*) :— Edward Muggleton purchased in 1772 certain copyhold property, held of a manor in which the custom was proved to be, that the land descended to the youngest son of the person last seised, if he had more than one ; and if no son, to the daughters as parceners ; and if no issue, then *to the youngest brother of the person last seised, and to the youngest son of such youngest brother.* There was, however, no formal record upon the rolls of the Court of the custom of the manor with respects to descents, but the custom was proved by numerous entries of admission. The purchaser died intestate in 1812, leaving two granddaughters, the only children of his only son, who died in his lifetime. One of the granddaughters died intestate and unmarried, and the other died leaving an only son, who died in 1854 without issue, and apparently intestate, and who was the person last seised. On his death the youngest son of the youngest brother of the purchaser brought an ejectment, and the Court of Exchequer, by two against one, decided against him. On appeal, this decision was confirmed by the Court of the Exchequer Chamber, by four judges against three. But much as the judges differed amongst themselves as to the extent of the custom amongst collaterals, they appear to have all agreed that the act to amend the law of inheritance had nothing to do with the matter. The act, however, expressly extends to lands descendible according to the custom of borough English *or any other custom ;* and it enacts that *in every case* descent shall be traced from the purchaser. Under the old law, seisin made the stock of descent. By the new law, the purchaser is substituted *in every case* for the person last seised. The legislature itself has placed this interpretation upon the above enactment. A well-known statute, commonly called the Wills Act (*b*), enacts, "that it shall be lawful for every person to devise or dispose of by his will, executed in manner hereinafter required, all real estate which he shall be entitled to, either at law or in equity,

(*a*) The substance of these observations appeared in letters to the editor of the "Jurist" newspaper, 4 Jur. N. S. Part 2, pp. 5, 56.

(*b*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3, *ante*, p. 238.

at the time of his death, *and which, if not so devised or disposed of, would devolve upon the* heir at law or *customary heir* of him, or, *if he became entitled by descent, of his ancestor.*" Now the old doctrine of *possessio fratris* was this,—that if a purchaser died seised, leaving a son and daughter by his first wife, and a son by his second wife, and the eldest son entered as heir to his father, the possession of the son made his sister of the whole blood to inherit as his heir, in exclusion of his brother of the half-blood; but if the eldest son did not enter, his brother of the half-blood was entitled *as heir to his father, the purchaser.* This doctrine was abolished by the statute. Descent in every case is to be traced from the purchaser. Let the eldest son enter, and remain ever so long in possession, his brother of the half-blood will now be entitled, on his decease, in preference to his sister of the whole blood, not as his heir, but *as heir to his father* (*c*).

Let us now take the converse case of a descent according to the custom of borough English, and let the purchaser die intestate, leaving a son by his first wife, and a son and daughter by his second wife. Here it is evident that the youngest son has a right to enter as customary heir. He enters accordingly, and dies intestate, and without issue. Who is the next heir since the statute? Clearly the brother of the half-blood, for he is the *customary heir of the purchaser.* As the common law, which is the general custom of the realm, was altered by the statute, and a person became entitled to inherit who before had no right, so the custom of borough English, and every other special custom, being expressly comprised in the statute, is in the same manner altered; and the stock of descent, which was formerly the person last seised, is now, in every case, the purchaser and the purchaser only.

Suppose, therefore, that Edward Muggleton, the purchaser, who died in 1812, had left a son by his first wife, and a son and daughter by his second wife, and that the youngest son, having entered as customary heir, died intestate in 1854,—who would be entitled? Clearly, the elder son, as customary heir, being of the male sex, in preference to the daughter. Before the act the sister of the whole blood would have inherited, as customary heir to her younger brother, and the elder brother, being of the half-blood to the person last seised, could not have inherited at all; but since the act the descent is traced from the purchaser; and the elder brother would, accordingly, be entitled, not as heir to his half-brother, but as heir to his father. The act then breaks in upon the custom. By the custom before the act the land descended to the sister of the person last seised, in default of brothers of the whole blood. By the act the purchaser is substituted for the person last seised, and whoever would be entitled as

(*c*) See Sugden's Real Property Statutes, pp. 280, 281 (1st ed.); 267, 268 (2nd ed.).

heir to the purchaser, if he had just died seised, must now be entitled as his heir, however long ago his decease may have taken place.

Let us put another case: Suppose the father of Edward Muggleton, the purchaser, had been living in 1854, when his issue failed. It is clear, that under the act the father would have been entitled to inherit, notwithstanding the custom. Here, again, the custom would have been broken in upon by the act, and a person would have been entitled to inherit who before was not.

Suppose, again, that the father of Edward Muggleton had been the purchaser, and that Edward Muggleton was his youngest son, and that the estate, instead of being a fee simple, had been an estate tail. Estates tail, it is well known, follow customary modes of descent in the same manner as estates in fee. The purchaser, however, or donee in tail, is and was, both under the new law and under the old, the stock of descent. The Courts appear to have been satisfied that in lineal descents according to the custom the youngest was invariably preferred. It is clear, therefore, that, when the issue of Edward Muggleton failed in 1854, the land would have descended to the plaintiff as youngest son of the next youngest son of the purchaser, although the plaintiff was but the first cousin twice removed of the person last seised.

The change, however, which the act has accomplished is simply to assimilate the descent of estates in fee to that of estates tail. The purchaser is made the stock in lieu of the person last seised. It is evident, therefore, that upon the supposition last put, of the father of Edward Muggleton being the purchaser, although the estate was an estate in fee, the plaintiff would have been entitled as customary heir.

The step from this case to that which actually occurred is very easy. On failure of the issue of the purchaser (whether after his decease or in his lifetime it matters not), the heir to be sought is the heir of the purchaser, and not the heir of the person last seised; and if the descent be governed by any special custom, then the customary heir of the purchaser must be sought for. Who, then, was the customary heir of Edward Muggleton, the purchaser? The case in *Muggleton* v. *Barnett* expressly states, that the land descends, if no issue, to the youngest son of the youngest brother of the person last seised, that is of the stock of descent. There is no magic in the phrase "last seised." These words were evidently used in the statement of the custom as they would have been used before the act in a statement of the common law. It would have been said that the land descends, for want of issue, to the eldest son of the eldest brother of the person last seised. It would have been taken for granted that everybody knew that seisin made the stock. The law, however, is now altered

in this respect. The purchaser only is the stock. If Edward Muggleton had died without leaving issue, the plaintiff clearly would have been entitled. His issue fails after his decease ; but so long as *he* is the stock, the same person under the same custom must of necessity be his heir.

It was expressly stated in the case, that there was no formal record with respect to descents. This is important, as showing that the person last seised was mentioned in the statement of the custom simply in accordance with the ordinary rule of law, that the person last seised was the stock of descent prior to the act. If, however, there had been such a formal record, still Edward Muggleton, the purchaser, died seised. If he had not died seised, it might be said, according to the strict construction placed upon the records of customary descent, that the custom did not apply, and that his heir according to the common law was entitled (*d*). But in the present case the custom is expressly stated to be gathered from admissions only ; and so long as the person last seised was by law the stock of descent, it is evident that a statement of the custom, as applying to the person last seised, was merely a statement with reference to the stock of descent as then existing. The act alters the stock of descent, and so far alters the custom. It substitutes the purchaser for the person last seised, whatever may be the custom as to descents. It follows, therefore, that the plaintiff in *Muggleton* v. *Barnett*, being the customary heir of the purchaser, was entitled to recover.

Since these observations were written, the following remarks have been made by Lord St. Leonards on the case of *Muggleton* v. *Barnett* ; —" In the result, the Exchequer and Exchequer Chamber, with much diversity of opinion as to the extent of the custom, decided the case against the claimant, who claimed as heir by the custom to the *last purchaser*, which he was ; because he was not heir by the custom to the *person last seised*. And yet the act extends to all customary tenures, and alters the descent in all such cases as well as in descents by the common law, by substituting the last purchaser as the stock from whom the descent is to be traced for the person last seised. The Court, perhaps, hardly explained the grounds upon which they held the statute not to apply to this case" (*e*).

(*d*) *Payne* v. *Barker*, O. Bridg. 18 ; *Rider* v. *Wood*, 1 K. & J. 644.

(*e*) Lord St. Leonards' Essay on the Real Property Statutes, p. 271 (2nd ed.).

APPENDIX (C).

Referred to, p. 301, n. (*a*).

On the decease of a woman entitled by descent to an estate in fee simple, is her husband, having had issue by her, entitled, according to the present law, to an estate for life, by the curtesy of England, in the whole or any part of her share? (*a*).

In order to answer this question satisfactorily, it will be necessary, first, to examine into the principles of the ancient law, and then to apply those principles, when ascertained, to the law as at present existing. Unfortunately the authorities whence the principles of the old law ought to be derived do not appear to be quite consistent with one another; and the consequence is, that some uncertainty seems unavoidably to hang over the question above propounded. Let us, however, weigh carefully the opposing authorities, and endeavour to ascertain on which side the scale preponderates.

Littleton, "not the name of the author only, but of the law itself," thus defines curtesy: "Tenant by the curtesie of England is where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme, but in England only" (*b*). And, in a subsequent section, he adds, "Memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath, *as heir to the wife;* in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, *but otherwise not*" (*c*). "Memorandum," says Lord Coke, in his Commentary (*d*), "this word doth ever betoken some excellent point of learning." Again, "*As heir to the wife.* This doth imply a secret of law; for, except the wife be

(*a*) The substance of the following observations appeared in the "Jurist" newspaper for March 14, 1846.

(*b*) Litt. s. 35.
(*c*) Litt. s. 52.
(*d*) Co. Litt. 40 a.

actually seised, the heir shall not (as hath been said) make himself heir to the wife ; *and this is the reason*, that a man shall not be tenant by the curtesie of a seisin in law." Here we find it asserted by Littleton that the husband shall not be tenant by the curtesy, unless he has had issue by his wife capable of inheriting the land *as her heir ;* and this is explained by Lord Coke to be such issue as would have traced their descent from the wife, as the stock of descent, according to the maxim, "*Seisina facit stipitem.*" Unless an actual seisin had been obtained by the wife, she could not have been the stock of descent ; for the descent of a fee simple was traced from the person last actually seised ; "and *this is the reason*," says Lord Coke, "that a man shall not be tenant by the curtesy of a mere seisin in law." The same rule, with the same reason for it, will also be found in *Paine's case* (*e*), where it is said, "And when Littleton saith, *as heir to the wife*, these words are very material ; for that is *the true reason* that a man shall not be tenant by the curtesy of a seisin in law ; for, in such case, the issue ought to make himself heir to him who was last actually seised." The same doctrine again appears in Blackstone (*f*). "And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised ; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife ; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised ; and, therefore, as the husband had never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence," continues Blackstone in his usual laudatory strain, "we may observe, with how much nicety and consideration the old rules of law were framed, and how closely they are connected and interwoven together, supporting, illustrating and demonstrating one another." Here we have, indeed, a formidable array of authorities, all to the point, that, in order to entitle the husband to his curtesy, his wife must have been the stock from whom the descent should have been traced to her issue ; for the principal and true reason that there could not be any curtesy of a seisin in law is stated to be, that the issue could not, in such a case, make himself heir to the wife, because his descent was then required to be traced from the person last actually seised.

Let us, then, endeavour to apply this principle to the present law. The act for the amendment of the law of inheritance (*g*) enacts (*h*), that in every case descent shall be traced from the purchaser. On the decease of a woman entitled by descent, the descent of her share is, therefore, to be now traced, not from herself, but from her ancestor, the purchaser from whom she inherited. With respect to the person to become entitled, as heir to the purchaser on this descent, if the

(*e*) 8 Rep. 56 a.
(*f*) 2 Black. Comm. 128.
(*g*) 3 & 4 Will. IV. c. 106.
(*h*) Sect. 2.

woman be a coparcener, the question arose which has already been mentioned (*i*), whether the surviving sister equally with the issue of the deceased, or whether such issue solely, are now entitled to inherit? And the conclusion at which the Courts have arrived is, that the issue alone succeed to their mother's share. But, whether this were so or not, nothing is clearer than that, on the decease of a woman entitled by descent, the persons who next inherit take as heir to the purchaser, and not to her; for, from the purchaser alone can descent now be traced; and the mere circumstance of having obtained an actual seisin does not now make the heir the stock of descent. How, then, can her husband be entitled to hold her lands as tenant by the curtesy? If tenancy by the curtesy was allowed of those lands only of which the wife had obtained actual seisin, because it was a necessary condition of curtesy that the wife should be the stock of descent, and because an actual seisin alone made the wife the stock of descent, how can the husband obtain his curtesy in any case where the stock of descent is confessedly not the wife, but the wife's ancestor? Amongst all the recent alterations of the law, the doctrine of curtesy has been left untouched: there seems, therefore, to be no means of determining any question respecting it, but by applying the old principles to the new enactments, by which, indirectly, it may be affected. So far, then, as at present appears, it seems a fair and proper deduction from the authorities, that, whenever a woman has become entitled to lands by descent, her husband cannot claim his curtesy, because the descent of such lands, on her decease, is not to be traced from her.

But, by carrying our investigations a little further, we may be disposed to doubt, if not to deny, that such is the law; not that the conclusion drawn is unwarranted by the authorities, but the authorities themselves may, perhaps, be found to be erroneous. Let us now compare the law of curtesy of an estate tail with the law of curtesy of an estate in fee simple.

In the section of Littleton, which we have already quoted (*k*), it is laid down, that, if a man taketh a wife *seised as heir* in tail especial, and hath issue by her, born alive, he shall, on her decease, be tenant by the curtesy. And on this Lord Coke makes the following commentary: "And here Littleton intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or *fee tail* general, and these lands descend to his daughter, and she taketh a husband and hath issue, *and dieth before any entry*, the husband shall not be tenant by the curtesy, and yet, in this case, she had a seisin in law; but, if she or her husband had, during her life, entered, he should have been tenant by the curtesy" (*l*). Now, it is well known that the descent of an estate tail is always traced from

(*i*) *Ante*, p. 232.
(*k*) Sect. 35.
(*l*) Co. Litt. 29 a.

the purchaser or original donee in tail. The actual seisin which might be obtained by the heir to an estate tail never made him the stock of descent. The maxim was "Possessio fratris *de feudo simplici* facit sororem esse hæredem." Where, therefore, a woman who had been seised as heir or coparcener in tail died, leaving issue, such issue made themselves heir not to her, but to her ancestor, the purchaser or donee; and whether the mother did or did not obtain actual seisin was, in this respect, totally immaterial. When actual seisin was obtained, the issue still made themselves heir to the purchaser only, and yet the husband was entitled to his curtesy. When actual seisin was not obtained, the issue were heirs to the purchaser as before; but the husband lost his curtesy. In the case of an estate tail, therefore, it is quite clear that the question of curtesy or no curtesy depended entirely on the husband's obtaining for his wife an actual seisin, and had nothing to do with the circumstance of the wife's being or not being the stock of descent. The reason, therefore, before mentioned given by Lord Coke, and repeated by Blackstone, cannot apply to an estate tail. An actual seisin could not have been required *in order* to make the wife the stock of descent, because the descent could not, under any circumstances, be traced from her, but must have been traced from the original donee to the heir of *his* body *per formam doni*.

Again, if we look to the law respecting curtesy in incorporeal hereditaments, we shall find that the reason above given is inapplicable; for the husband, on having issue born, was entitled to his curtesy out of an advowson and a rent, although no actual seisin had been obtained, in the wife's lifetime, by receipt of the rent or presentation to the advowson (*m*). And yet, in order to make the wife the stock of descent as to such hereditaments, it was necessary that an actual seisin should be obtained by her (*n*). The husband, therefore, was entitled to his curtesy where the descent to the issue was traced from the ancestor of his wife, as well as where traced from the wife herself. In this case, also, the right of curtesy was accordingly independent of the wife's being or not being the stock from which the descent was to be traced.

We are driven, therefore, to search for another and more satisfactory reason why an actual seisin should have been required to be obtained by the wife, in order to entitle her husband to his curtesy out of her lands; and such a reason is furnished by Lord Coke himself, and also by Blackstone. Lord Coke says (*o*), "Where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an

(*m*) Watk. Descents, 39 (47, 4th ed.).
(*n*) *Ibid.* 60 (67, 4th ed.).
(*o*) Co. Litt. 31 a.

actual seisin, *as the husband may do of his wife's land when he is to be tenant by curtesy*, which is worthy the observation." It would seem from this, therefore, that the reason why an actual seisin was required to entitle the husband to his curtesy was, that his wife may not suffer by his neglect to take possession of her lands: and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of. This reason is also adopted by Blackstone from Coke: "A seisin in law, of the husband will be as effectual as a seisin in deed, in order to render the wife dowable: for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: *which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself, in her right, was actually seised in deed*" (*p*). The more we investigate the rules and principles of the ancient law, the greater will appear the probability that this reason was indeed the true one. In the troublous time of old, an actual seisin was not always easily acquired. The doctrine of continual claim shows that peril was not unfrequently incurred in entering on lands for the sake of asserting a title; for, in order to obtain an actual seisin, any person entitled, if unable to approach the premises, was bound to come as near as he dare (*q*). And "it is to be observed," says Lord Coke, "that every doubt or fear is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses or the taking away or spoiling his goods, this is not sufficient" (*r*). That actual seisin should be obtained was obviously most desirable, and nothing could be more natural or reasonable than that the husband should have no curtesy where he had failed to obtain it. Perkins seems to think that this was the reason of the rule; for in his Profitable Book he answers an objection to it, founded on an extreme case. "But if possession in law of lands or tenements in fee descend unto a married woman, which lands are in the county of York, and the husband and his wife are dwelling in the county of Essex, and the wife dieth within one day after the descent, so as the husband could not enter during the coverture, for the shortness of the time, yet he shall not be tenant by the curtesy, &c.: and yet, according to common pretence, there is no *default in the husband*. But it may be said that the husband of the woman, before the death of the ancestor of the woman, might have spoken unto a man dwelling near unto the place where the lands lay, to enter for the woman, as in her right, immediately after the death of her ancestor," &c. (*s*). This reason for the rule is also quite consistent with the circumstance that the husband was entitled to

(*p*) 2 Black. Comm. 131.
(*q*) Litt. ss. 419. 421.
(*r*) Co. Litt. 253 b.
(*s*) Perk. 470.

his curtesy out of incorporeal hereditaments, notwithstanding his failure to obtain an actual seisin. For if the advowson were not void, or the rent did not become payable during the wife's life, it was obviously impossible for the husband to present to the one or receive the other; and it would have been unreasonable that he should suffer for not doing an impossibility, the maxim being "impotentia excusat legem." This is the reason, indeed, usually given to explain this circumstance; and it will be found both in Lord Coke (*t*) and Blackstone (*u*). This reason, however, is plainly at variance with that mentioned in the former part of this paper, and adduced by them to explain the necessity of an actual seisin, in order to entitle the husband to his curtesy out of lands in fee simple.

There still remains, however, the section of Littleton, to which we have before referred (*x*), as an apparent authority on the other side Littleton expressly says, that when the issue may, by possibility, inherit, *of such an estate as the wife hath, as heir to the wife*, the husband shall have his curtesy, but *otherwise not*; and we have seen that, according to Lord Coke's interpretation, to inherit *as heir to the wife*, means here to inherit *from the wife as the stock of descent*. But the legitimate mode of interpreting an author certainly is to attend to the context, and to notice in what sense he himself uses the phrase in question on other occasions. If now we turn to the very next section of Littleton, we shall find the very same phrase made use of in a manner which clearly shows that Littleton did not mean, by inheriting as heir to a person, inheriting from that person as the stock of descent. For, after having thus laid down the law as to curtesy, Littleton continues: "And, also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as, by possibility, it may happen that the wife may have issue by her husband, and that the same issue may, by possibility, inherit the same tenements *of such an estate as the husband hath, as heir to the husband*, of such tenements she shall have her dower, and *otherwise not*" (*y*). Now, nothing is clearer than that a wife was entitled to dower out of the lands of which her husband had only seisin in law (*z*); and nothing, also, is clearer than that a seisin in law only was insufficient to make the husband the stock of descent: for, for this purpose, an actual seisin was requisite, according to the rule "seisina facit stipitem." In this case, therefore, it is obvious that Littleton could not mean to say that the husband must have been made *the stock of descent*, by virtue of having obtained an actual seisin; for that would have been to contradict the plainest rules of law. What, then, was his meaning? The subsequent part of the same section affords an explanation: "For, if tenements be given to a man and to the heirs [which he shall

(*t*) Co. Litt. 29 a.
(*u*) 2 Black. Comm. 127.
(*x*) Sect. 52.
(*y*) Litt. s. 53.
(*z*) Watk. Descents, 32 (42, 4th ed.).

beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate tail as donee in special tail. Yet, if the husband die without issue, the same wife shall be endowed of the same tenements, because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But, if the wife dieth leaving her husband, and after the husband taketh another wife and dieth, his second wife shall not be endowed in this case, *for the reason aforesaid*." This example shows what was Littleton's true meaning. He was not thinking, either in this section or the one next before it, of the husband or wife being the stock of descent, instead of some earlier ancestor. He was laying down a general rule, applicable to dower as well as to curtesy; namely, that if the issue that might have been born in the one case, or that were born in the other, of the surviving parent, could not, by possibility, inherit the estate of their deceased parent, by right of representation of such parent, then the surviving parent was not entitled to dower in the one case, or to curtesy in the other. It is plain that, in the example just adduced, the issue of the husband by his second marriage could not possibly inherit his estate, which was given to him and the heirs of his body by his first wife; the second wife, therefore, was excluded from dower out of this estate. And, in the parallel case of a gift to a woman and the heirs of her body by her first husband, it is indisputable that, for a precisely similar reason, her second husband could not claim his curtesy on having issue by her; for such issue could not possibly inherit their mother's estate. All that Littleton then intended to state with respect to curtesy, was the rule laid down by the Statute De Donis (*a*), which provides that, where any person gives lands to a man and his wife and the heirs of their bodies, or where any person gives land in frankmarriage, the second husband of any such woman shall not have anything in the land so given, after the death of his wife, by the law of England, nor shall the issue of the second husband and wife succeed in the inheritance (*b*). When the two sections of Littleton are read consecutively, without the introduction of Lord Coke's commentary, their meaning is apparent; and the intervening commentary not only puts the reader on the wrong clue but hinders the recovery of the right one, by removing to a distance the explanatory context.

Having at length arrived at the true principles of the old law, the application of them to the state of circumstances produced by the new law of inheritance will be very easy. A coparcener dies leaving a husband who has had issue by her, and leaving one or more sisters surviving her. The descent of her share is now traced from their common parent, the purchaser. But, in tracing this descent, we have

(*a*) 13 Edw. I. c. 1.
(*b*) See Bac. Abr. tit. Curtesy of England (C), 1.

seen (*c*) that the issue of the deceased coparcener would inherit her entire share by representation of her. And the condition which will entitle her husband to curtesy out of her share appears to be, that his issue might possibly inherit the estate by right of representation of their deceased mother. This condition, therefore, is obviously fulfilled, and our conclusion consequently is, that the husband of a deceased coparcener, who has had issue by her, is entitled to curtesy out of the whole of her share. But in order to arrive at this conclusion, it seems that we must admit, first, that Lord Coke has endeavoured to support the law by one reason too many; and, secondly, that one laudatory flourish of Blackstone has been made without occasion.

(*c*) *Ante*, p. 232.

APPENDIX (D).

Referred to, pp. 472, 474.

THE Manor of Fairfield in the County of Middlesex. } A Genera Court Baron of John Freeman Esq Lord of the said Manor holden in and for the said Manor on the 1st day of January in the third year of the reign of our Sovereign Lady Queen Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and in the year of our Lord 1840 Before John Doe Steward of the said Manor.

At this Court comes A. B. one of the customary tenants of this manor and in consideration of the sum of £1000 of lawful money of Great Britain to him in hand well and truly paid by C. D. of Lincoln's Inn in the county of Middlesex Esq. in open Court surrenders into the hands of the lord of this manor by the hands and acceptance of the said steward by the rod according to the custom of this manor All that messuage &c. [*here describe the premises*] with their appurtenances (and to which same premises the said A. B. was admitted at the general Court holden for this manor on the 12th day of October 1838) And the reversion and reversions remainder and remainders rents issues and profits thereof And all the estate right title interest trust benefit property claim and demand whatsoever of the said A. B. in to or out of the same premises and every part thereof To the use of the said C. D. his heirs and assigns for ever according to the custom of this manor.

Consideration.

Surrender.

Parcels.

Estate.

Now at this Court comes the said C. D. and prays to be admitted to all and singular the said customary or copyhold hereditaments and premises so surrendered to his use at this Court as aforesaid to whom the lord of this manor by the said steward grants seisin thereof by the rod TO HAVE AND TO HOLD the said messuage hereditaments and premises with their appurtenances unto the said C. D. and his heirs to be holden of the lord by copy of Court roll at the will of the lord according to the custom in this manor by fealty suit of court and the ancient annual rent or rents and other duties and services therefor due and of right accustomed And so (saving the right of the lord) the said C. D. is admitted tenant thereof and pays to the lord on such his admittance a fine certain of £50 and his fealty is respited.

Admittance.

Habendum.

Fine £50.

(Signed) John Doe Steward.

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